Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

URANTIA FOUNDATION,
an Illinois Charitable Trust,

Petitioner,

v.

MICHAEL FOUNDATION, INC.,
a non-profit corporation, and HARRY MCMULLAN, III,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1.

If a party properly raises an issue of law before the case goes to the jury, e.g., in a motion for summary judgment, is the party required to include the issue of law in its Rule 50 motion at trial regarding the sufficiency of the evidence in order to preserve the question of law for *de novo* review on appeal?

2.

Given the lengthy terms accorded to copyrights by the Copyright Term Extension Act of 1998 and the statutory presumption of validity accorded to registered copyrights, should questions of copyright validity be subject to jury determination based upon the subjective intent of long-deceased authors, or, is copyright validity a question for the court based upon the work itself?

LIST PURSUANT TO RULE 29.6

The caption of the case contains the names of all the parties.

CORPORATE DISCLOSURE STATEMENT

Urantia Foundation is a non-profit charitable foundation that operates under a Declaration of Trust created in 1950. Urantia has no stock and thus has no parent corporations and no shareholders.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on March 11, 2003.

OPINIONS BELOW

1. *Michael Foundation, Inc. v. Urantia Foundation, an Illinois Charitable Trust v. Harry McMullan III and Michael Foundation, Inc.*, United States District Court for the Western District of Oklahoma, Case No. CIV-00-885-W, Order granting in part and denying in part Urantia's Motion for Partial Summary Judgment entered on June 8, 2001. (App. 32-76).[1]

2. *Michael Foundation, Inc. v. Urantia Foundation, an Illinois Charitable Trust v. Harry McMullan III and Michael Foundation, Inc.*, United States District Court for the Western District of Oklahoma, Case No. CIV-00-885-W, Order denying Urantia's Renewed Motion for Judgment as a Matter of Law entered on June 8, 2001. (App. 26-31).

3. *Michael Foundation, Inc. v. Urantia Foundation, an Illinois Charitable Trust v. Harry McMullan III and Michael Foundation, Inc.*, United States Court of Appeals for the Tenth Circuit, Case No. 01-6347, Opinion filed and judgment entered on March 11, 2003, affirming the District Court's Order. (App. 1-25).

4. *Michael Foundation, Inc. v. Urantia Foundation, an Illinois Charitable Trust v. Harry McMullan III and Michael Foundation, Inc.*, United States Court of Appeals for the Tenth Circuit, Case No. 01-6347, Order Denying

[1] Citations to the appendix to this petition are indicated as "(App. #)" and citations to the record below are indicated as "(R. #)".

Urantia's Petition for Rehearing entered on April 11, 2003. (App. 77-78).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on March 11, 2003, and a timely petition for rehearing was denied on April 11, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court's decision on this Petition for Writ of Certiorari.

STATUTES INVOLVED

1. Rule 50 of the Federal Rules of Civil Procedure is reprinted in full in the appendix. (App. 93-95).

2. The pertinent parts of 17 U.S.C. § 302 and 17 U.S.C. § 410 are reprinted in the appendix. (App. 95-96).

STATEMENT OF THE CASE

Urantia Foundation ("Urantia") has held the federally registered copyright to *The Urantia Book* for almost fifty years. No one other than Urantia has ever claimed an interest in the copyright in any of the 196 individual papers collected in *The Urantia Book* or in the book itself. Although the *validity* of Urantia's copyright and renewal registration has been challenged before, previous courts have always upheld the validity of Urantia's original and renewal copyright as a matter of law. The District Court denied Urantia's motion for summary judgment on the eve of trial and, then, after a trial, erroneously submitted the *legal* question of copyright validity *vel non* to a jury which rendered a verdict invalidating Urantia's long-held copyright. The verdict was improperly based upon an erroneous jury instruction requiring the jury to consider the supposed *subjective authorial intent* (based on events of almost 100 years ago) as determinative on the issue of

whether *The Urantia Book* is a composite work for purposes of copyright validity as opposed to deciding the case based upon the work itself.

The Tenth Circuit refused to address the merits of Urantia's argument on appeal that the District Court erred in submitting the legal question of copyright validity to the jury by finding that Urantia *waived this argument* essentially by participating in the jury trial and not continually objecting to the submission of the case to the jury (i.e., raising the denial of the summary judgment motion) in its Rule 50 motion challenging the sufficiency of the evidence or in its exception to the jury charge. As a result of this finding of waiver based upon an erroneous and overly technical application of Rule 50, the Tenth Circuit applied the deferential "any evidence" standard to the jury's determination of the legal question of copyright validity instead of the *de novo* standard of review applied to a district court's determination of legal questions.

The Tenth Circuit's sanctioning of the District Court's abdication of its exclusive province as the arbiter of legal issues is contrary to the majority of circuits holding that there is "no bar to reviewing the legal question notwithstanding the party's failure to raise it in a motion for judgment as a matter of law at trial." *Chemetall GMBH v. Zr Energy, Inc.*, 320 F.3d 714, 720 (7th Cir. 2003) (citing cases). Legal questions erroneously submitted to the jury must always remain subject to *de novo* review on appeal to preserve litigants' rights to due process of law. *Cooper Industries v. Leatherman Tool Group*, 532 U.S. 424, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001); *Sparf and Hansen v. United States*, 156 U.S. 51, 106, 15 S. Ct. 273, 39 L. Ed. 343 (1895). The Tenth Circuit has instead followed the minority view that a legal determination by a jury is subject to the same deferential standard of review applied to a jury's factual determinations. This conflict among the circuits regarding the once separate roles of judge and jury requires this Court's guidance to resolve.

The Tenth Circuit also refused to address the District Court's error in charging the jury that authorial intent is determinative of the nature of the copyrighted work for copyright validity purposes, despite noting that Urantia's objection to this charge had been preserved, by finding that the jury could not have based its verdict on the possibly irrelevant evidence of authorial intent. However, the Tenth Circuit's own deferential review of the sufficiency of the evidence supporting the jury's determination that *The Urantia Book* is not a composite work relies almost *exclusively* upon the same evidence of authorial intent it found to be non-prejudicial.

REASONS FOR GRANTING THE WRIT

This case presents important and recurring questions regarding the degree of stringency with which Rule 50 of the Federal Rules of Civil Procedure should be applied. In this case, the Tenth Circuit applied Rule 50 to foreclose a litigant's right to a *de novo* review of questions of law erroneously submitted to a jury after the denial of that litigant's motion for summary judgment, not because of the existence of disputed facts, but because a legal question was mischaracterized by the District Court as a factual question. Rule 50 considerations and issues permeate the trial of every case tried in federal court. The decision below applied Rule 50 in a strict and mechanical way – contrary to the expressed spirit of the Federal Rules of Civil Procedure – which resulted in the appellate court deferring to a jury on a question of law. Fed. R. Civ. P. 1. The Tenth Circuit has joined and exacerbated a circuit conflict by finding *sua sponte* that Urantia waived an objection to the submission of a legal issue to a jury, and therefore applied a deferential standard of review to the jury's determination of the *legal issue* of copyright validity where most circuits would have found the issue preserved for a *de novo* review. This Court should grant the Writ of Certiorari to resolve this conflict and instruct our Courts

of Appeals that the law requires *de novo* review of all *legal questions* whether or not they are improperly submitted to a jury and that Rule 50 is properly applied to test the sufficiency of the evidence; and, legal issues otherwise raised prior to judgment are preserved for *de novo* review on appeal even if not explicitly raised in a Rule 50 motion at trial.

This case also presents an important question of preserving the public policy in favor of copyright validity embodied in the statutory presumption of validity afforded to registered copyrights by 17 U.S.C. § 410(c) in light of the Copyright Term Extension Act ("CTEA") of 1998 which provides that most copyrights now run from creation until 70 years after the author's death, or, in the case of anonymous works, pseudonymous works, and works made for hire, for a term of the earlier of 95 years from publication or 120 years from creation. 17 U.S.C. § 302. Sound public policy should prohibit would-be infringers from challenging the validity of long-held copyrights based upon the subjective intent of an author who may have been deceased for many decades. Jury trials based on ancient authorial intent will necessarily entail significant difficulties in proof unfairly force copyrighted works prematurely into the public domain. The District Court below, affirmed by the Tenth Circuit, instructed the jury that in determining the nature of the copyrighted work for validity purposes, "the intent of the author is controlling", despite the fact that neither the individual deemed to be the author for copyright purposes (who has been deceased for at least twenty-five years), nor anyone who had met this author, testified at trial. This important question of federal copyright law has not been, but should be, settled by this Court. This Court should grant the Writ of Certiorari to settle this issue and hold that authorial intent is only relevant in determining the nature of a copyrighted work for validity purposes to the extent that the author's intent is manifested in the work itself.

I. Statement of Facts and Procedural History.

A. Creation and publication of *The Urantia Book*.

This case arises from a series of religious, philosophical, and scientific writings dating from the early 1900s known as the Urantia Papers which were originally published together as *The Urantia Book* in 1955 by Urantia Foundation ("Urantia"), a public charitable trust formed in 1950 and entrusted with the duty to preserve inviolate the text of *The Urantia Book* and to maintain exclusive control over the means of reproducing *The Urantia Book* and all translations thereof. Few details are known about how the Urantia Papers came into existence. (R. 2905-2906). The few individuals with firsthand knowledge of the creation of the Urantia Papers are deceased (R. 2713) and, while they were alive, chose not to divulge many details about the specific manner in which the Urantia Papers were created. (R. 2905-2906). It is believed that between approximately 1923 and 1942, in response to questions posed by the Contact Commission, 196 individual papers, later known as the "Urantia Papers", on numerous subjects were communicated through a deliberately anonymous individual, the Conduit,[2] who was

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[2] Urantia's trustees and representatives believe that the 196 Urantia Papers, which were ultimately compiled into *The Urantia Book*, were authored by various celestial beings identified in *The Urantia Book* and that the human subject through whom the papers were communicated was not involved in the creation of the Urantia Papers except as a conduit for the celestial beings (hereinafter the "Conduit" as referred to by the Tenth Circuit below). However, the divine origins of *The Urantia Book* is not a matter for the courts, as the Ninth Circuit held in *Maaherra*:

> The copyrightability issue is not a metaphysical one requiring the courts to determine whether or not the Book had celestial origins. In this case, the belief both parties may have regarding those origins, and their claim that the

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deemed to be the "author" for copyright purposes at trial. (App. 3). The Urantia Papers touch on many subjects, including anatomy, anthropology, astronomy, biology, chemistry, cosmology, criminology, economics, education, evolution, genetics, geology, government, history, philosophy, history of religion, philosophy of religion, medicine, physics, psychology, sociology, family, marriage and science. (R. 2410/vii-lxvi). No one other than Urantia has ever claimed copyright in any of the individual Urantia Papers or in *The Urantia Book*. (R. 3394, 3468-3469). For nearly fifty years, Urantia has held and protected the copyright to *The Urantia Book* entrusted to its care.

Book is a product of divine revelation, is a matter of faith, and obviously a crucial element in the promotion and dissemination of the Book. For copyright purposes, however, a work is copyrightable if copyrightability is claimed by the first human beings who compiled, selected, coordinated, and arranged the Urantia teachings, "in such a way that the resulting work as a whole constitutes an original work of authorship." 17 U.S.C. § 101 (defining a "compilation"). See also 17 U.S.C. § 103 (providing that compilations are copyrightable). Those who were responsible for the creation of the tangible literary form that could be read by others, could have claimed copyright for themselves as "authors," because they were responsible for the revelations appearing "'in such a way' as to render the work as a whole original." [*Feist Publications, Inc. v. Rural Telephone Service Company, Inc.*, 499 U.S. 340, 358, 113 L. Ed. 2d 358, 111 S. Ct. 1282 (1991)] (referring to the statutory definition of compilation).

Urantia v. Maaherra, 114 F.3d 955, 958 (9th Cir. 1997). Accordingly, the parties stipulated below that the Conduit would be deemed the legal author for copyright purposes.

B. Urantia's copyright in *The Urantia Book* has been previously upheld as valid as a matter of law.

Urantia's copyright in *The Urantia Book* has been previously upheld as valid as a matter of law in three different cases. The validity of Urantia's original claim of copyright has been upheld as a matter of law by two different district courts. *Urantia Foundation v. Burton*, 210 U.S.P.Q. (BNA) 217, 1980 U.S. Dist. LEXIS 16302 (W.D. Mich. Aug. 29, 1980); *Urantia Foundation v. King*, 194 U.S.P.Q. (BNA) 171, 1977 U.S. Dist. LEXIS 16803 (C.D. Cal. Mar. 21, 1977). In 1991, Urantia sued Kristen Maaherra for copyright infringement, and Maaherra filed a counterclaim asserting that the renewal copyright in *The Urantia Book* is invalid. *Urantia Foundation v. Maaherra*, 114 F.3d 955 (9th Cir. 1997). The *Maaherra* case presented the identical legal issues as the case below and Harry McMullan III ("McMullan"), third party defendant below and a disaffected former supporter of Urantia, contributed approximately $73,000 to finance Maaherra's challenge to Urantia's copyright in *The Urantia Book*. (R. 3047). The District Court had granted summary judgment to Maaherra on the grounds that Urantia's renewal copyright was invalid. The Ninth Circuit reversed and held "that the Foundation has established that it was, at the time of renewal, the proprietor of a composite work" as a matter of law. *Id.* at 957. The case was remanded for further proceedings on damages. Ultimately, the Ninth Circuit upheld the validity of Urantia's renewal copyright as a matter of law. *Urantia Foundation v. Maaherra*, 210 F.3d 387 (9th Cir. 2000).

C. McMullan takes a second bite at the apple.

After the *Maaherra* decision, McMullan published a substantial portion of *The Urantia Book* without permission. (R. 2458-2459). He did so by forming Michael

Foundation, Inc. (declaratory judgment plaintiff below) and causing it to publish and begin selling a verbatim reproduction of 76 consecutive papers from Part IV of *The Urantia Book*. (R. 1903-1923). McMullan and Michael Foundation (together, the "McMullan Parties") do not claim any right or interest in the copyright to *The Urantia Book*, but rather contend that Urantia's 1983 renewal copyright registration is invalid because Urantia was not the proper party to renew the copyright. They claim that the renewal was therefore invalid and that Urantia no longer holds a valid United States copyright in *The Urantia Book* as a result.

Urantia maintains that its renewal copyright is valid because, under the governing 1909 Copyright Act, *The Urantia Book* is both a composite work and a commissioned work as a matter of law.[3] Copyrights in both kinds of works can be renewed by the work's proprietor and, as the original publisher and copyright registrant, Urantia is the proprietor of *The Urantia Book*. Urantia therefore was the proper party to renew the copyright registration, and its copyright remains valid and enforceable.

1. The District Court's decision below.

Urantia filed a motion for partial summary judgment requesting the District Court to uphold the validity of Urantia's renewal copyright as a matter of law. The District Court granted Urantia's motion in part holding that Urantia is the proprietor of the copyright in *The Urantia Book* as a matter of law as did the Ninth Circuit in *Maaherra*. (R. 32, 58). Although the District Court

[3] A composite work is a work composed of multiple individual pieces that retain their separate character. A commissioned work is a category of works made for hire in which the work is created at the instance and expense of the commissioning party.

found that "[d]etermining the nature of a particular work is a mixed question of law and fact" (App. 60), it denied Urantia's motion for summary judgment requesting the District Court to find that *The Urantia Book* is a composite work as a matter of law (and that Urantia's copyright renewal is thus valid) on the basis that "the record regarding the origins of the Urantia Papers is not yet complete enough for this Court to determine whether *The Urantia Book* is a composite work" and "factual questions remain as to how precisely the Papers were written" because "the record is devoid of evidence as to whether the Conduit intended the Urantia Papers to be separate, discrete works."[4] (App. 63-64). The District Court similarly held that "the record was insufficient to make a concrete determination" on the issue of whether *The Urantia Book* was a commissioned work as a matter of law. (App. 66). The District Court's order denying Urantia's motion for summary judgment was issued the Friday before trial was to begin on Monday. (App. 32, 34).

Three days after the denial of Urantia's motion for summary judgment, the jury trial began and Michael Foundation presented "evidence" that *The Urantia Book* was not a composite or commissioned work. The parties reserved the right to make their Rule 50(a) motions until the close of all the evidence (App. 80), at which time Urantia moved for judgment as a matter of law on the same issues presented in its recently denied summary judgment motion, namely, that *The Urantia Book* was either or both a composite work and a commissioned work

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[4] Of course, as copyright registrations are presumed to be valid and Michael Foundation had the burden of proving that *The Urantia Book* was not a composite work, an "incomplete record" should have resulted in the grant of summary judgment to Urantia. *See* Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986).

as a matter of law and its renewal copyright registration was therefore valid. (App. 91). Nevertheless, the District Court submitted these legal questions to the jury and it returned a verdict in favor of the McMullan Parties, finding that *The Urantia Book* is neither a composite work nor a commissioned work and that Urantia's renewal copyright in *The Urantia Book* was invalid. (R. 354.)

Urantia timely renewed its motion for judgment as a matter of law after the verdict pursuant to Rule 50(b) and again requested that the District Court enter judgment as a matter of law in favor of Urantia that the renewal copyright in *The Urantia Book* is valid and was infringed by Michael Foundation. (R. 000363). Urantia's Rule 50(b) brief explicitly argued that "*The Urantia Book* is a composite work as a matter of law" and that "[w]hether *The Urantia Book* is a commissioned work is a question of law subject to *de novo* review." (R. 000364, 000384). The District Court acknowledged Urantia's argument that *The Urantia Book* is a commissioned work or a composite work as a matter of law (App. 28, 30), but again denied Urantia's motion. (App. 26-31). The McMullen Parties did not argue, and the District Court did not find, that Urantia had waived this argument. (App. 26-31). The case was then appealed to the Tenth Circuit.

2. The Tenth Circuit's opinion below.

Urantia argued again on appeal to the Tenth Circuit that it was entitled to a *de novo* review on the question of whether *The Urantia Book* was a commissioned work or a composite work, rather than the more deferential standard appropriate to review the District Court's denial of a renewed motion for judgment as a matter of law after a jury verdict.[5] The Tenth Circuit held *sua sponte* the

[5] Courts recognize that copyright validity issues should be determined by judges and not juries whether the issues are either pure legal issues or mixed questions of law and fact. *The Yankee Candle Co. v.*

(Continued on following page)

Urantia had waived this argument because Urantia "participated below in all phases of a jury trial and never objected to the submission of the classification question to the jury." (App. 11).

The Tenth Circuit acknowledged that its finding of waiver was determinative of the core issue in the entire case:

> Had Urantia preserved this argument for appeal, and were the classification question actually settled in its favor, Urantia would be entitled to a *de novo* review on the question of whether *The Urantia Book* is a commissioned or a composite

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Bridgewater Candle Co., 259 F.3d 25, 34 (1st Cir. 2001) ("The extent to which the Yankee labels contain protected expressions is a matter of law."); *Collezione Europa U.S.A., Inc. v. Hillsdale House, Ltd.*, 243 F. Supp. 2d 444, 451-452 (M.D.N.C. 2003) (holding that "[c]ertain matters of law, including determinations of copyrightability in all instances are always reserved to the judge"); *Pivot Point Int'l v. Charlene Prods.*, 932 F. Supp. 220 (N.D. Ill. 1996) (Easterbrook, J., holding that "whether mannequin heads in general, or these mannequin heads in particular, are copyrightable is a question of law, which the court will decide. A jury has nothing to do with this subject . . . in a trial there is only one legal expert – the judge."); *American Dental Assoc. v. Delta Dental Plans Assoc.*, 1996 U.S. Dist. LEXIS 5809 (N.D. Ill. 1996), *rev'd on other grounds*, 126 F.3d 977 (7th Cir. 1997) (noting that "because allowing juries to determine the issues of copyrightability are fraught with problems such as inconsistency of judgment, costs, and complexity, I agree with Judge Keeton's tentative conclusion that the issues of fact concerning copyrightability generally 'must be determined by the court, not the jury' "); *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 788 F. Supp. 78, 85 (1992) (Keeton, J., holding that "[t]he legal test for determining copyrightability . . . is a standard requiring an evaluative mixed law-fact determination, as distinguished from a bright-line rule calling for a finding about disputed facts" and "all questions of law and fact bearing on copyrightability of elements of a computer software program are to be decided by a court, not a jury"); 3-12 *Nimmer on Copyright* § 12.10[B][1] (2003); *see also Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 372, 116 S. Ct. 1384, 134 L. Ed. 2d 577 (1996) (holding that the interpretation of the claims of a patent is a pure question of law to be resolved by the court).

> work, rather than the more deferential standard appropriate to review of a district court's denial of a renewed motion for judgment as a matter of law. Urantia has, however, waived any such argument, and we therefore need not reach the unsettled question of whether initial classification of works is, in all cases, a question of law for the court.

(App. 9). The Tenth Circuit based its finding of waiver on the following grounds: (i) Urantia failed to "object to the submission of the classification question to the jury" at the charge conference or during its exceptions to the charge;[6] and (ii) Urantia's oral Rule 50(a) motion and Rule 50(b) renewed motion primarily addressed the sufficiency of plaintiff's evidence rather than the erroneous submission of the issue to the jury in the first place. (App. 9-10). The Tenth Circuit applied a deferential standard of review by viewing the record in the light most favorable to the nonmoving party and affirming if there is any evidence

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[6] This basis for the Tenth Circuit's finding of waiver constitutes plain error. Regardless of whether Urantia objected to the jury instructions in this case, Rule 51 does not prevent normal *de novo* appellate review of legal questions erroneously submitted to the jury after the denial of Urantia's Rule 56 motion for summary judgment and Rule 50(b) motion for judgment as a matter of law. In *St. Louis v. Praprotnik*, 485 U.S. 112, 118-20, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1988) (quoting *Springfield v. Kibbe*, 480 U.S. 257, 264, 94 L. Ed. 2d 293, 107 S. Ct. 1114 (1987) (O'Connor, J., dissenting)) (citations omitted), this Court stated: "Although the same legal issue was raised both by those motions and by the jury instruction, 'the failure to object to an instruction does not render the instruction the 'law of the case' for purposes of appellate review of the denial of a directed verdict or judgment notwithstanding the verdict [the two kinds of motions now unified in a Rule 50(b) motion].'" *Id.*; *see also* Wright & Miller, *Federal Practice and Procedure* § 2537 (2d ed. 1995) (citing cases) ("The failure of a party to object to the jury instructions does not make them the law of the case so as to preclude the entry of judgment as a matter of law if it is required by law."). Accordingly, the Tenth Circuit erred in finding that Urantia had waived its right to a *de novo* review of all questions of law erroneously submitted to the jury.

upon which the jury could properly return a verdict for the nonmoving party. (App. 11). Applying this deferential "any evidence" standard, the Tenth Circuit affirmed the jury's determination that *The Urantia Book* is neither a composite work nor a commissioned work. (App. 12-23). As a result, Urantia's long-held copyright registration in *The Urantia Book* was found to be invalid.

II. Argument and Citation of Authority.

A. If a party properly raises an issue of law before the case goes to the jury, e.g., in a motion for summary judgment, is the party required to include the issue of law in its Rule 50 motion at trial regarding the sufficiency of the evidence in order to preserve the question of law for *de novo* review on appeal?

1. A majority of circuits have held that there is no bar to reviewing a legal question otherwise raised prior to judgment notwithstanding the party's failure to raise it in a motion for judgment as a matter of law at trial.

The Tenth Circuit's opinion in this case has turned Rule 50 into an overly-technical trap for the unwary and abdicated its responsibility to review questions of law *de novo*. The lower courts and the bar require this Court's guidance on the degree of stringency with which our Courts of Appeals should apply Rule 50 of the Federal Rules of Civil Procedure and the extent to which a party must continually preserve its right to have legal issues reviewed *de novo*. The question is:

> If a party properly raises an issue of law before the case goes to the jury, e.g., in a motion for summary judgment, is the party required to include the issue of law in its Rule 50 motion at trial regarding the sufficiency of the evidence in

order to preserve the question of law for *de novo* review on appeal?

Urantia had filed a motion seeking summary judgment that its renewal copyright was valid as a matter of law pursuant to Rule 56 of the Federal Rules of Civil Procedure. The District Court below denied Urantia's motion for summary judgment on the Friday before the trial began on Monday. When the material facts are not in dispute and the denial of summary judgment is based on the interpretation on a purely legal question, a denial of the motion is generally appeallable after final judgment. *See* James Wm. Moore, *Moore's Federal Practice* § 56.41[3][f], p. 56.310-311 (3d ed. 2003).

Whether the issue is framed explicitly as an appeal of the denial of a motion for summary judgment or as an appeal of a legal issue erroneously submitted to the jury, a majority of circuits considering the issue have held that "if the legal question can be separated from the factual one, then [there is] no bar to reviewing the legal question notwithstanding the party's failure to raise it in a motion for judgment as a matter of law at trial." *Chemetall GMBH v. Zr Energy, Inc.*, 320 F.3d 714, 720 (7th Cir. 2003); *see also Rose v. Uniroyal Goodrich Tire Co.*, 219 F.3d 1216, 1221 n.3 (10th Cir. 2000) (contract interpretation); *White Consol. Indus., Inc. v. McGill Mfg. Co.*, 165 F.3d 1185, 1189-90 (8th Cir. 1999) (same); *Pennbarr Corp. v. Ins. Co. of N. Am.*, 976 F.2d 145, 149-55 (3d Cir. 1992) (same) (reversing denial of motion for summary judgment after trial); *Pavon v. Swift Transp. Co.*, 192 F.3d 902, 906 (9th Cir. 1999) (res judicata); *United Techs. Corp. v. Chromalloy Gas Turbine Corp.*, 189 F.3d 1338, 1344 (Fed. Cir. 1999) (res judicata) (reversing judgment after trial); *McPherson v. Kelsey*, 125 F.3d 989, 995 (6th Cir. 1997) (governmental immunity); Wright & Miller, *Federal Practice and Procedure* § 2536 (2d ed. 2001 Supp.) ("When a party has been denied summary judgment, the failure to move for judgment as a matter of law will not preclude that party from seeking appellate review of the denial of summary judgment."). Judge Posner explained:

> [T]he principle that an order denying summary judgment is rendered moot by trial and subsequent judgment on the merits is intended for cases in which the basis for the denial was that the party opposing the motion had presented enough evidence to go to trial. Defenses are not extinguished merely because presented and denied at the summary judgment stage. If the plaintiff goes on to win, the defendant can reassert the defense on appeal.

Rekhi v. Wildwood Indus., Inc., 61 F.3d 1313, 1318 (7th Cir. 1995).

This is consistent with the majority view that Rule 50 should not be strictly applied to defeat valid legal defenses. Professor Moore explains:

> A majority of courts take a broad view of what constitutes a sufficient predicate for a Rule 50(b) motion. In deciding whether to excuse a movant's failure to assert a Rule 50(a) motion, courts often look to the purpose of Rule 50(b) in providing notice of evidentiary deficiencies before the close of the evidence. When the trial court and opposing parties are alerted to grounds on which evidence is allegedly insufficient before the case is submitted to a jury, technical noncompliance with Rule 50(b) may be excused, particularly when the nonmoving party has not been prejudiced by noncompliance.

9-50 *Moore's Federal Practice* § 50.40[2] (2003) (footnotes omitted); *see also* Wright & Miller, *Federal Practice and Procedure* § 2533 (1995) ("The rule does not require technical precision in stating the grounds of the motion."). A failure to move for judgment as a matter of law on a purely legal issue during the trial does not implicate the policy of allowing a non-movant to correct evidentiary deficiencies prior to the jury rendering its verdict. This is especially true when the court and the parties are fully aware of a litigant's position that a particular issue is a

matter of law due to that litigant's recently denied summary judgment motion.[7]

Prior to the case at bar, the Tenth Circuit had followed the majority rule and held that "[a] party who properly raises an issue of law before the case goes to the jury 'need not include the issue in a motion for a directed verdict in order to preserve the question on appeal.'" *Ruyle v. Cont'l Oil Co.*, 44 F.3d 837, 841-42 (10th Cir. 1994) (quoting *Landes Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1370 (9th Cir. 1987). However, by finding waiver of the legal issue raised by Urantia in its summary judgment motion and deferring to the jury's determination of this legal question, the Tenth Circuit has implicitly rejected *Ruyle* and joined the Fourth Circuit in its strict construction of Rule 50. The Tenth Circuit did not address this inconsistency in its opinion.

The Fourth Circuit has rejected any distinction between factual and legal issues and holds that review of a district court's denial of summary judgment is barred after trial. *Chesapeake Paper Prods. Co. v. Stone & Webster Eng'g Corp.*, 51 F.3d 1229, 1236 (4th Cir. 1995). The Fourth Circuit explained the rationale for this rule as follows:

> In effect, [appellant's] argument advocates a dual approach in which this Court would review denials of summary judgment after a full trial when the party seeking review alleges that the district court made an erroneous legal conclusion, such as applying an incorrect legal standard, but not when the party seeking review alleges that the

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[7] Additionally, in the "Final Pretrial Report" filed by the parties while Urantia Foundation's summary judgment motion was pending, Urantia Foundation identified the number one legal issue in the case as: "Whether the copyright renewal in *The Urantia Book* is valid." (R. 170).

> court made an erroneous factual determination. We reject the contention that our review should depend on whether the party claims an error of law or an error of fact. Such a dichotomy is problematic because all summary judgment decisions are legal decisions in that they do not rest on disputed facts. The legal nature of summary judgment decisions is evident from our traditional *de novo* standard for reviewing such decisions. Furthermore, such a dichotomy would require this Court to engage in the dubious undertaking of determining the bases on which summary judgment is denied and whether those bases are "legal" or "factual."

Id. at 1235 (internal citations omitted) (holding that Rule 50 provides the sole route to appellate review of both legal and factual issues and that "this Court will not review, under any standard, the pretrial denial of a motion for summary judgment after a full trial and final judgment on the merits").[8] The Fourth Circuit did not take note of the fact that this "problematic dichotomy" between questions of law and questions of fact is also critical to maintaining the proper spheres of judge and jury and is commonly used by appellate courts to determine the appropriate standard of review. *See Sparf and Hansen v. United States*, 156 U.S. 51, 106, 15 S. Ct. 273, 39 L. Ed. 343 (1895) ("In this separation of the functions of court and jury is found the chief value, as well as safety, of the jury system. Those functions cannot be confounded or disregarded without

[8] The Eighth Circuit has the opposite track record of the Tenth Circuit on this issue. In *Metropolitan Life Ins. Co. v. Golden Triangle*, 121 F.3d 351, 354 (8th Cir. 1997), the Eighth Circuit had embraced the view expressed by the Fourth Circuit in *Chesapeake Paper Products Co.*, but then rejected that position two years later in *White Consol. Indus., Inc. v. McGill Mfg. Co., Inc.*, 165 F.3d 1185, 1190 (8th Cir. 1999), without addressing the inconsistency in the later opinion.

endangering the stability of public justice, as well as the security of private and personal rights.").

With the Tenth Circuit now joining the minority view, the bench and bar require this Court to clarify the extent to which a party's failure to raise the erroneous submission of a legal question to the jury in its Rule 50 motion will allow our courts of appeals to avoid *de novo* review of the jury's determination of such questions of law.

2. Sound public policy as well as this Court's precedent regarding the separate roles of judge and jury require that the jury's determination of an erroneously submitted legal question should not be accorded deference as would be accorded to the jury's determination of facts.

A party need not raise the erroneous submission of a legal question to the jury in its Rule 50 motion challenging the sufficiency of the opposing party's evidence to preserve the right to a *de novo* review of all questions of law on appeal. *Chemetall Gmbh v. Zr Energy, Inc.*, 320 F.3d 714, 719-720 (7th Cir. 2003) (citing cases). A jury's determination of such a question of law should not be accorded deferential review, but should be reviewed *de novo*. *See Driggins v. Oklahoma City*, 954 F.2d 1511, 1513 (10th Cir. 1992), *overruled sub silentio by Michael Foundation, Inc. v. Urantia Foundation*, 2003 U.S. LEXIS 4232, *16 (10th Cir. 2003) (holding that "when a district court erroneously submits a question of law to the jury, we employ a *de novo* standard of review and address the legal question"); *Landes Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1370 (9th Cir. 1987) (finding that party had raised legal issue of statute of frauds in a motion in limine and that "[a]s long as a party properly raises an issue of law before the case goes to the jury, it need not include the issue in a motion for a directed verdict in order to preserve

the question on appeal"); *Cunningham & Co. v. Consol. Realty Mgmt., Inc.*, 803 F.2d 840, 843 (5th Cir. 1986) (holding that the appellate court must resolve question of law erroneously submitted to the jury *de novo*).

The very purpose of Rule 50 is to maintain the separate roles of jury as arbiter of fact questions and judge as arbiter of legal questions. Professors Wright and Miller have noted:

> The federal courts followed the orthodox doctrine that questions of fact are for the jury and questions of law are for the court. . . . Rule 50 is one of the judicial control devices devised by the Federal Rules of Civil Procedure so that the district court may enforce rules of law.

Wright & Miller, *Federal Practice and Procedure* § 2521 (1995). This Court long ago explained:

> Upon the court rests the responsibility of declaring the law; upon the jury, the responsibility of applying the law so declared to the facts as they, upon their conscience, believe them to be. Under any other system, the courts, although established in order to declare the law, would for every practical purpose be eliminated from our system of government as instrumentalities devised for the protection equally of society and of individuals in their essential rights. When that occurs our government will cease to be a government of laws, and become a government of men. Liberty regulated by law is the underlying principle of our institutions.

Sparf and Hansen v. United States, 156 U.S. 51, 102-103, 15 S. Ct. 273, 39 L. Ed. 343 (1895).

Rule 50 was amended in 1991 to use the term "judgment as a matter of law" rather than "directed verdict" to "mirror[ ] the standard for summary judgment under Rule 56", *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 2110 (2000), and "call[ ] attention to the relationship between the two rules." Fed. R. Civ. P. 50

advisory committee's note (1991). The Advisory Committee's note to the 1991 amendment to Rule 50 assures that "action taken under the rule . . . is not an intrusion on any responsibility for factual determinations conferred on the jury by the Seventh Amendment or any other provision of federal law," and stresses that the revision "aims to facilitate the exercise by the court of its responsibility to assure the fidelity of its judgment to the controlling law, a responsibility imposed by the Due Process Clause of the Fifth Amendment." *Id.* (citing *Galloway v. United States*, 319 U.S. 372 (1943)). The Tenth Circuit has turned this stated purpose on its head by applying a hyper-technical reading of Rule 50 to sanction the District Court's abdication of its "responsibility to assure the fidelity of its judgment to the controlling law. . . . " *Id.*

The Tenth Circuit's erroneous finding that Urantia had waived its right to a *de novo* appeal of the legal issues in this case effectively endorsed the District Court's transfer of the court's responsibility to resolve a difficult legal question to the jury. The Tenth Circuit first noted that Urantia would have been entitled to a *de novo* review if it had preserved the issue, and then held that "Urantia has, however, waived any such argument, and we therefore need not reach the unsettled question of whether initial classification of works is, in all cases, a question of law for the court." (App. 9). By purporting to apply the more deferential "any evidence" standard to the jury's resolution of the legal question at issue,[9] the Tenth Circuit

[9] The fallacy of applying the "any evidence" standard to the resolution of a pure legal question, or even to a mixed question of law and fact, is self-evident. A copyrighted work either is or is not a composite work based upon the legal standards applicable to the classification of the work. "Evidence", other than the work itself, does not change the inherent nature of the work.

accorded a jury of laypersons greater deference on this *question of law* than it would have accorded the District Court if the District Court had not improperly submitted the legal question to the jury and had ruled itself.

This Court explicitly instructs, "issues of law are to be resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the court." *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657, 55 S. Ct. 890, 891, 79 L. Ed. 1636 (1935). The division of roles between judge and jury is axiomatic to the Seventh Amendment right to a jury trial and the Fifth Amendment right to due process of law. "The Court has previously noted the vexing nature of the distinction between questions of fact and questions of law." *Pullman-Standard, Inc. v. Swint*, 456 U.S. 288, 102 S. Ct. 1790, 72 L. Ed. 2d 66 (1982) (citing *Baumgartner v. United States*, 322 U.S. 665, 671 (1944)). This Court held in *Miller v. Fenton*, 474 U.S. 104, 114, 106 S. Ct. 445, 88 L. Ed. 2d 405 (1985), that when an issue "falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." Our federal courts of appeals generally review district court decisions by "accepting findings of fact that are not 'clearly erroneous' but deciding questions of law *de novo*." *First Options v. Kaplan*, 514 U.S. 938, 948, 115 S. Ct. 1920, 1926, 131 L. Ed. 2d 985 (1995) (holding that federal policy favoring arbitration does not require the application of a specially lenient "abuse of discretion" standard (even as to questions of law) when reviewing district court decisions that affirm (but

not those that set aside) arbitration awards and that the customary standards of review continue to apply in the arbitration arena). Even when the district court is also the finder of fact, Rule 52(a)'s "clearly erroneous" standard of review does not apply when the district court's findings rest on an erroneous view of the law. *Pullman-Standard*, 456 U.S. at 288, 102 S. Ct. at 1790. Similarly, the deference typically given to a jury's findings of fact and the district court's review of a jury verdict should not apply to a jury's resolution of an erroneously submitted question of law.

As appellate judges are equally if not better capable of deciding legal questions as district court judges, our appellate courts *do not give any deference to a trial judge's decision on an issue of law* (yet, the court below gave great deference to a jury's decision of a legal question) and reviews such determinations independently, or *de novo*. This Court has previously held that "[t]he obligation of responsible appellate jurisdiction implies the requisite authority to review independently a lower court's [legal] determinations." *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231, 111 S. Ct. 1217, 1221, 113 L. Ed. 2d 190 (1991) (holding that a court of appeals should review *de novo* a district court's determination of state law). The *Salve* Court explained further:

> Independent appellate review of legal issues best serves the dual goals of doctrinal coherence and economy of judicial administration. District judges preside alone over fast-paced trials: Of necessity they devote much of their energy and resources to hearing witnesses and reviewing evidence. Similarly, the logistical burdens of trial advocacy limit the extent to which trial counsel is able to supplement the district judge's legal research with memoranda and briefs. Thus, trial judges often must resolve complicated legal questions without benefit of extended reflection or extensive information.

> Courts of appeals, on the other hand, are structurally suited to the collaborative juridical process that promotes decisional accuracy. With the record having been constructed below and settled for purposes of the appeal, appellate judges are able to devote their primary attention to legal issues. As questions of law become the focus of appellate review, it can be expected that the parties' briefs will be refined to bring to bear on the legal issues more information and more comprehensive analysis than was provided for the district judge. Perhaps most important, courts of appeals employ multijudge panels that permit reflective dialogue and collective judgment.

Id. (internal citations and quotations omitted). "There is also support in decisions of this Court for the proposition that conclusions on mixed questions of law and fact are independently reviewable by an appellate court. . . . " *Pullman-Standard*, 456 U.S. at 289 n.19, 102 S. Ct. at 1790 n.19. The requirement of *de novo* review of legal questions, such as legal issues bearing on the validity of a federally registered copyright, is not a mere procedural nicety subject to inadvertent waiver by participating in a jury trial after losing a motion for summary judgment in a manner endorsed by a majority of our circuit courts of appeals. This Court should grant the Writ and resolve this conflict among the circuits going to the very heart of the Federal Rules of Civil Procedure – liberal versus hypertechnical interpretations.

B. Given the lengthy terms accorded to copyrights by the Copyright Term Extension Act of 1998 and the statutory presumption of validity accorded to registered copyrights, should questions of copyright validity be subject to jury determination based upon the subjective intent of long-deceased authors, or, is copyright validity a question for the court based upon the work itself?

The District Court erred in charging the jury that in determining whether a work is a composite work "the intent of the author is controlling."[10] (App. 16). In 1998, Congress enacted the Copyright Term Extension Act ("CTEA") providing that most copyrights now run from creation until 70 years after the author's death, or, in the case of anonymous works, pseudonymous works, and works made for hire, for a term of the earlier of 95 years from publication or 120 years from creation. 17 U.S.C. § 302. This Court recently held that the application of these extended copyright terms to pre-existing copyrights is constitutional. *Eldred v. Ashcroft*, 537 U.S. 186, 123 S. Ct. 769, 154 L. Ed. 2d 683 (2003). Moreover, Congress has also provided that registered copyrights are presumed to be valid. 17 U.S.C. § 410(c) ("In any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate."). Sound public policy should prohibit would-be infringers from challenging the

[10] Urantia contends that the question of whether *The Urantia Book* is a composite work and hence the question of copyright validity should never have been submitted to the jury and should have been determined by the District Court as a question of law. *See* § II.A., *supra*. Whether determined by judge or jury, the intent of the author, except as embodied in the work itself, is irrelevant to determining the nature of the work for copyright validity purposes.

validity of long-held copyrights based upon the subjective intent of an author who may have been deceased for sixty years. Jury trials on ancient authorial intent will necessarily entail significant difficulties in proof and unfairly force copyrighted works prematurely into the public domain.

Between approximately 1923 and 1942, in response to questions posed by the Contact Commission, individual papers (the "Urantia Papers") on numerous subjects were communicated through an anonymous individual, the Conduit, who was deemed to be the "author" for copyright purposes at trial.[11] (App. 2). All of the Conduit and the Contact Commission's rights in these papers were transferred to the Urantia Foundation ("Urantia"), which published 196 papers together as *The Urantia Book* under notice of copyright in 1955. (App. 2-3). Urantia holds the original 1956 copyright registration and the 1983 renewal certificate. (App. 3). The Conduit died prior to 1977. (App. 36). None of the witnesses who testified at trial had met or even knew the identity of the Conduit.

Under both the 1909 Copyright Act and the 1976 Copyright Act, the proprietor of a "periodical, cyclopedic, or other composite work" is entitled to renew the copyright it originally obtained in the work. 17 U.S.C. § 24 (repealed); 17 U.S.C. § 304(a)(1)(B)(i). The District Court held that Urantia was the proprietor of *The Urantia Book* as a matter of law. (App. 6-7, 58). Therefore, if *The Urantia Book* is a composite work, Urantia properly renewed the copyright registration in 1983 and the copyright will remain valid until 2050.

Although *The Urantia Book* itself was admitted into evidence, the outcome of the composite work issue, and

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[11] *See* note 2, *supra*.

thus the validity of Urantia's copyright, was submitted to the jury to be determined by the ancient subjective intent of the deceased anonymous Conduit. The District Court charged the jury as follows:

> Keep in mind that where the works of only one author are involved, *the intent of the author is controlling*.

(App. 16) (emphasis added). The Tenth Circuit noted that Urantia had properly objected to this instruction, and that "[t]he statute and the caselaw are silent on the question" of whether the intent of the author (whose identity was unknown and who had been deceased for at least twenty-five years) is relevant, much less controlling, on the issue of whether *The Urantia Book* is a composite work for purposes of the validity of Urantia's long-held copyright. (App. 16). *Again refusing to address the merits of Urantia's appeal*, the Tenth Circuit dodged this important question and simply affirmed the jury verdict:

> Because the question appears to be unsettled, we cannot, without settling the question ourselves, say that the district court's articulation of the standard in its jury instruction is erroneous. We need not reach this question, because even if the instruction overstated the importance of authorial intent, we find no grounds therein for reversal. . . . Especially in light of (1) the fact that the Conduit, being dead, did not testify as to his intentions, leaving the details of those intentions part of the murky history of the composition of *The Urantia Book*, and (2) the fact that the book itself was, as Urantia Foundation points out, in evidence, we see no reason whatsoever to believe that the jury *based its verdict* on the possibly erroneous instruction.

(App. 16-17).

Deferring to the decision of the jury, the Tenth Circuit found that its determination that *The Urantia Book* is not a composite work was supported by the evidence. (App.

12-18). The only "evidence" cited by the Tenth Circuit to support the jury's determination that *The Urantia Book* is not a composite work involved the supposedly non-prejudicial evidence of authorial intent:

> i. The Contact Commission published the Urantia Papers "precisely as the Conduit presented them."
>
> ii. "The Conduit also announced, before writing the papers that eventually became *The Urantia Book*, that he would create a book, not a series of separate papers."
>
> iii. "The jury also heard evidence that, while the individual papers bear separate titles, they are not distinct, unrelated works but chapters of *The Urantia Book*, *which the Conduit intended to constitute a unified work*." (Emphasis added).

(App. 14). Apparently, the Tenth Circuit also believed that the "intent of the author is controlling" as the District Court erroneously instructed the jury.

Neither the statute nor the case law, however, mentions the intention of the author(s) as a factor in determining a work's status as a composite work, and for good reason. In the case of encyclopedias, for example, the writers of the various contributions may know about the encyclopedic effort while preparing their contributions and may intend each contribution to join with the others to form a finished encyclopedia. Such intentions in no way undercut the separate and independent nature of the works. Instead, *the courts have taken it upon themselves* to evaluate the various contributions in question to determine whether they merge to form a single work without distinguishable components, or whether they remain separate components of a composite work. *Compare Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 161 F.2d 406, 409 (2d Cir. 1946), *cert. denied*, 331 U.S. 820 (1947) (describing work where contributions merge into a single joint work) *with* 17 U.S.C. § 101 (definition of collective work).

The work itself manifests the author's intent, if intent is relevant. *The Urantia Book* states that it is comprised of separate and independent parts. (R. 2410/16 (Foreword refers to the Urantia Papers as "presentations")). Paper 30, the next to last paper in Part I, states that "The Mortal Corps of the Finality is dealt with in the next and *final paper of this series*." (R. 2410/337). Paper 64 commences a "story," stating "[t]his is the story of the evolutionary races of Urantia from the days of Andon and Fonta, almost one million years ago, down through the times of the Planetary Prince to the end of the ice age." (R. 2410/718). The end of another of the separate parts states, "[a]nd thus ends the story of the Planetary Adam and Eve of Urantia. . . . " (R. 2410/854). Most significantly, *The Urantia Book* expressly refers to itself as a "composite presentation":

> *The Urantia Papers*. The papers, of which this is one, constitute the most recent presentation of truth to the mortals of Urantia. These papers differ from all previous revelations, for they are not the work of a single universe personality but a *composite presentation* by many beings.

(R. 2410/1008 (emphasis added)).

In short, the District Court should have determined the composite work issue as a matter of law based on the abundant evidence from *The Urantia Book* itself. The jury should not have been permitted to invalidate Urantia's long-held copyright based upon the supposed subjective intentions of the deceased Conduit.

In the only other case to address whether a work is a composite work as a matter of law for purposes of copyright renewal, the Ninth Circuit considered the same issue presented by this case and held that Urantia's renewal copyright in *The Urantia Book* is valid because the book is a composite work as a matter of law within the meaning of the 1909 Act. In *Urantia Foundation v. Maaherra*, 895 F. Supp. 1347 (D. Ariz. 1995), *rev'd on other grounds*, 114 F.3d 955 (9th Cir. 1997), the District Court determined

that the composite structure of The Urantia Book – 196 separate "papers," attributed to over fifty different celestial beings – qualifies The Urantia Book as a composite work. "The Urantia Papers are obviously distinguishable parts. . . . " *Id.* at 1354. On appeal, the Ninth Circuit *held that Urantia was the proprietor of a composite work as a matter of law* and that the renewal copyright was valid.

For these reasons, the District Court erred by not deciding that *The Urantia Book* is a composite work as a matter of law, as the Ninth Circuit held in *Maaherra*, and instead submitting the issue to the jury with the erroneous instruction that "the intent of the author is controlling" on the issue of whether *The Urantia Book* is a composite work for copyright validity purposes. With the passage of the Copyright Term Extension Act of 1998, this Court must provide guidance to the bench and bar as to whether copyrights which enjoy a statutory presumption of validity shall be subject to challenge based upon secondary evidence of ancient authorial intentions. This Court should hold that authorial intent is only relevant in determining the nature of a copyrighted work for validity purposes to the extent that the author's intent is embodied in the work itself. Accordingly, the judgment should be reversed and remanded for further proceedings on remedies.

This the 10th day of July, 2003.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

MICHAEL FOUNDATION, INC., a foreign corporation,

Plaintiff-Appellee,

v.

URANTIA FOUNDATION, an Illinois Charitable Trust,

Defendant-Third-Party Plaintiff-Appellant,

v.

HARRY MCMULLAN, III,

Third-Party Defendant-Appellee.

No. 01-6347 and 01-6348 (D. Ct. No. CIV-00-885-W) (W.D. Okla.)

ORDER AND JUDGMENT*

(Filed Mar. 11, 2003)

Before **TACHA**, Chief Circuit Judge, **ALDISERT**,** and **McWILLIAMS**, Senior Circuit Judges.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. This court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

** The Honorable Ruggero J. Aldisert, Senior Circuit Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

Declaratory judgment defendant, third-party and counterclaim plaintiff Urantia Foundation appeals the district court's denial of its renewed motion for judgment as a matter of law and its alternative motion for a new trial. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and AFFIRM.

I. BACKGROUND

Urantia Foundation is a charitable trust formed under Illinois law. Michael Foundation is a non-profit corporation organized under Oklahoma law. This appeal arises out of the parties' dispute as to the present validity of Urantia Foundation's copyright in *The Urantia Book,* a document comprising the scriptural basis for the Urantia movement. The history of the composition of *The Urantia Book,* or such of that history as is available, bears directly upon the resolution of this case.

In approximately 1900, an unknown patient ("the Conduit") sought psychiatric help from Dr. William Sadler.[1] The Conduit behaved strangely in his sleep, and during sessions with the Conduit, Dr. Sadler became convinced that the Conduit was channeling "celestial personalities." At some point, the Conduit began present-

[1] No one knows who the Conduit was, but the parties agree that he composed the text of *The Urantia Book.* Throughout its briefs, Urantia Foundation refers to him as "the subject"; Michael Foundation refers to him as "Writer." Given that the terms the parties have selected to refer to the composer of *The Urantia Book* carry overtones suggestive of the principles of copyright law underlying this case, and that his status as a conduit for celestial revelation is not in dispute, we refer to him by what we hope to be a copyright-neutral term.

ing Dr. Sadler with handwritten "papers," purportedly consisting of the fruits of his communion with these celestial beings. Sometime later in the course of his treatment, Dr. Sadler opened up his sessions with the Conduit to a group of relatives that referred to itself as "The Contact Commission." During its sessions with the Conduit, the Contact Commission prepared stenographic notes of the Conduit's celestial dialogs, but it destroyed most of them. The notes formed no part of *The Urantia Book*.

In 1924, after approximately twenty years of treatment and generating "papers," the Conduit announced that he would compose *The Urantia Book*. He solicited questions from the Contact Commission to present to the celestial beings during his psychiatric sessions. Dr. Sadler formed a subgroup of the Contact Commission ("the Forum") to prepare these questions. Between 1935 and 1942, in response to these questions, the Conduit delivered a foreword and 196 handwritten "papers" that together constitute *The Urantia Book*. The Contact Commission reviewed the papers and typed them. It did not change their arrangement or edit them in any way other than to correct spelling and capitalization errors. It also destroyed all documents related to the questions presented to the Conduit. The Conduit was never compensated for his efforts in creating *The Urantia Book*.

In 1950, Urantia Foundation was formed in Illinois as a charitable trust. In 1955, the Conduit permitted *The Urantia Book* to be published, and later the same year Urantia Foundation published *The Urantia Book* under notice of copyright. Urantia Foundation registered its copyright in 1956 and currently holds the original and the 1983 renewal certificates as *The Urantia Book's* "author". In 1999, Michael Foundation, a non-profit corporation

chaired by third-party defendant and appellee Harry McMullan III, himself a disaffected former adherent of the Urantia movement, published *Jesus – A New Revelation,* which reprints verbatim seventy-six of the 196 papers constituting *The Urantia Book.*

This litigation commenced when Michael Foundation and McMullan filed a declaratory judgment action seeking a declaration that Urantia Foundation's copyright in *The Urantia Book* was invalid or, in the alternative, that their book did not infringe upon Urantia Foundation's copyright. Urantia Foundation asserted numerous counterclaims against Michael Foundation and third party claims against McMullan; it moved for summary judgment as to, *inter alia,* the validity of its renewal copyright in *The Urantia Book.* The district court denied its motion, and the case proceeded to trial before a jury. At the close of evidence, the parties moved for judgment as a matter of law. The district court denied all such motions, and the jury returned a verdict in favor of Michael Foundation and McMullan. Urantia Foundation renewed its motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b); it moved in the alternative for a new trial, asserting that the district court abused its discretion in excluding certain testimony. The district court denied both motions, and Urantia Foundation brought this appeal.

II. DISCUSSION

A. The District Court's Denial of Urantia Foundation's Renewed Motion for Judgment as a Matter of Law

1. Classification of Works for Copyright Purposes

Urantia Foundation first registered its copyright in *The Urantia Book* in 1956. The continued validity of its copyright depends upon whether it effectively renewed that copyright in 1983. Under the governing renewal provisions, as a general rule, only the author or the author's heirs could renew the copyright in a literary work at the expiration of the initial term, regardless of whether the author had conveyed those rights for the duration of the initial term. 17 U.S.C. § 304(a)(1)(C).[2] The parties agree that neither the Conduit nor his heirs renewed the copyright in *The Urantia Book*. Urantia Foundation advances two theories to support its claim that it holds valid renewal rights in *The Urantia Book* under exceptions to the general rule: first, that *The Urantia Book* is a composite of discrete, individual works by the Conduit, rather than a unified work, and that Urantia Foundation, as proprietor of the copyright in that composite,[3] was entitled to renew the copyright in both the compilation

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[2] While the relationship between the Conduit and the Contact Commission is defined by provisions of the 1909 Act and relevant caselaw, renewal of subsisting copyrights still in their first term as of 1978 (e.g., Urantia Foundation's copyright in *The Urantia Book*) is presently governed by section 304 of the 1976 Act, as amended. 17 U.S.C. § 304.

[3] "Proprietor" in this context refers to the entity under whose copyright the work is published; the term is distinct from *author*, which refers to the actual creator of the work.

and in the underlying works; and second, that *The Urantia Book* is a commissioned work because Urantia Foundation's predecessor in interest specially commissioned the Conduit to write *The Urantia Book,* entitling Urantia Foundation to renew its copyright as *The Urantia Book's* "author" under a judicially created corollary to a statutory exception governing works created for hire.[4] We consider each theory in turn.

Under the governing statute, if *The Urantia Book* is classified as a unified work by a single author, then Urantia Foundation cannot currently hold a valid renewal copyright because renewal rights in such works were not assignable until they vested, and the Conduit was dead by 1983. Thus, if *The Urantia Book* is a unified work, copyright transferred by operation of law to the Conduit's heirs in 1983, and they are the only persons who could have renewed or assigned it to Urantia Foundation. Because they did not renew the copyright, if *The Urantia Book* is a unified work, it now resides in the public domain.

If, however, *The Urantia Book* is a composite work, then Urantia Foundation's renewal copyright in *The Urantia Book* is valid. Urantia Foundation is the proprietor of the copyright in *The Urantia Book* and, under the governing statute, the proprietor of a copyright in a composite work may renew its copyright in both the compilation and the individual underlying works. 17 U.S.C. § 304(a)(1)(B)(i). The district court held on

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[4] We note that these two arguments are mutually exclusive; if the Conduit was the author, as the first theory requires, then Urantia Foundation's predecessor in interest could not be the author, as the second requires.

summary judgment that Urantia Foundation is the proprietor of the copyright, and Michael Foundation does not challenge that holding. Thus, if *The Urantia Book* is a composite work and the Conduit is its author, Urantia Foundation owns the copyright in both the arrangement of the works in the composite and in the underlying works themselves, because the Conduit transferred his rights to Dr. Sadler, who then transferred them to Urantia Foundation in a deed of trust.

The alternative exception under which Urantia Foundation asserts the validity of its renewal copyright in *The Urantia Book* invokes the "commissioned works doctrine." Under this judicially created doctrine, the nature of the book itself is not at issue; the focus instead is upon the relationship between the Contact Commission and the Conduit and the circumstances of the work's creation. If, under the test developed by the caselaw,[5] the Contact Commission specially commissioned *The Urantia Book* from the Conduit, then Urantia Foundation – as the Contact Commission's successor in interest – was entitled to renew its copyright in 1983 as its proprietor. 17 U.S.C. § 24 (repealed); 17 U.S.C. 304(a)(1)(B)(ii).

The facts Urantia Foundation must prove to support these alternative arguments are as follows:

Composite work argument:

- The Conduit composed *The Urantia Book,* then assigned his interest in it to Urantia Foundation's predecessor in interest prior to

[5] See Part II.B.4., *infra.*

The Urantia Book's publication in 1955, making Urantia Foundation the proprietor of the rights in *The Urantia Book, and*

- *The Urantia Book* is a *composite work,* entitling Urantia Foundation to renew its copyright in 1983 under the proprietor exception to the usual renewal provisions.

Commissioned work argument:

- The Contact Commission was the "author" of *The Urantia Book* because it specially commissioned the Conduit to write it, making *The Urantia Book* a *commissioned work* under a judicially created doctrine parallel to the work for hire provisions of the 1909 Act, *and*

- Urantia Foundation, as the Contact Commission's predecessor in interest, qualifies as the Conduit's employer, entitling it to renew *The Urantia Book* as a work for hire in 1983.[6]

Urantia Foundation secured a jury instruction in its favor as to the first proposition (i.e., that it is the proprietor of the copyright in *The Urantia Book*). The district court submitted the remaining three propositions to the jury, which found against Urantia Foundation in each case.

2. Standard of Review

Urantia Foundation argues, as a preliminary matter, that the question of initial classification of works for

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[6] We borrow here from Appellee's chart of these issues.

copyright purposes is a question of law for the court and that the district court therefore erred when it submitted the question to the jury. Had Urantia Foundation preserved this argument for appeal, and were the classification question actually settled in its favor, Urantia Foundation would be entitled to a de novo review on the question of whether *The Urantia Book* is a commissioned or a composite work, rather than the more deferential standard appropriate to review of a district court's denial of a renewed motion for judgment as a matter of law. Urantia Foundation has, however, waived any such argument, and we therefore need not reach the unsettled question of whether initial classification of works is, in all cases, a question of law for the court.

In the district court, Urantia Foundation's attorneys drafted proposed jury instructions and participated in a conference at which the parties agreed with the court upon – or preserved objections to – the jury instructions. They were present when the district court read the instructions to the jury. At none of these points did Urantia Foundation object to the submission of the classification question to the jury. The portion of the transcript of the instructions conference relevant to "Instruction Number 23, Work for Hire/Commissioned Work" suggests just the opposite; Urantia Foundation's counsel clearly contemplated submission of the question to the jury. The same is true of portion of the transcript relevant to "Instruction Number 26, Composite Definition."

Urantia Foundation's oral Rule 50(a) motion at the close of evidence for judgment as a matter of law did not

mention the issue.[7] We find Urantia Foundation's only allusion to this argument below in its brief in support of its Rule 50(b) renewed motion: a single, undeveloped sentence in the brief reads, "Whether *The Urantia Book* is a commissioned work is a question of law subject to de novo review." This sentence serves – confusingly – as the topic sentence of a paragraph attacking the sufficiency of the evidence submitted to the jury, not the propriety of submitting the question to the jury in the first place. Neither Michael Foundation nor the district court appear to have responded to this sentence, or, indeed, to have in any way discerned the question-of-law argument.

We have consistently held that a movant's renewed motion under Rule 50(b) may not advance new legal arguments; i.e., the renewed motion's scope is restricted to issues developed in the initial motion. Our decision in *Vanderhurst v. Colorado Mountain College District,* 208 F.3d 908 (10th Cir. 2000), is instructive. In that case, following a jury trial at which the movant did not object to the submission of an issue to the jury, the movant sought on appeal to argue that the issue was properly one of law for the court alone. We declined to consider the argument, and stated that

> This court generally will not entertain arguments on appeal which the appellant failed to raise before the district court. More specifically, "[a Rule 50] motion for judgment as a matter of law made at the close of all the evidence

[7] In fact, in the course of his oral motion, Urantia Foundation's attorney stated, "As to the unified nature of the work, I think there's certainly a fact issue for the jury to decide on that at a minimum."

> preserves for review only those grounds specified at the time, and no others." Finally, Rule 51 of the Federal Rules of Civil Procedure states, "No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection."

Id. at 915 (citations omitted).

Given its failure to raise the argument at trial, Urantia Foundation's lengthy briefing of the issue on appeal is unavailing. Urantia Foundation participated below in all phases of a jury trial and never objected to the submission of the classification question to the jury. It may not at this late date attempt to avoid the deferential standard appropriate to our review of a district court's denial of a jnov motion.

The standard of review for denial of a renewed motion for judgment as a matter of law in a jury trial contesting the validity of a copyright is clear:

> We review the district court's denial of a renewal motion for judgment as a matter of law de novo, applying the same standards as the district court. We must affirm if, viewing the record in the light most favorable to [the nonmoving party], there is evidence upon which the jury could properly return a verdict for [the nonmoving party]. We do not weigh the evidence, pass on the credibility of the witnesses, or substitute our conclusions for that [sic] of the jury. However, we must enter judgment as a matter of law in favor of the moving party if "there is no legally sufficient evidentiary basis . . . with respect to a claim or defense . . . under the controlling law."

Harolds Stores, Inc. v. Dillard Department Stores, Inc., 82 F.3d 1553, 1546-47 (10th Cir. 1996) (citations omitted).

3. Composite Work

We proceed, under the standard articulated *supra,* to consider whether the record contains evidence upon which a reasonable jury could have concluded that *The Urantia Book* is not a composite work. Any such evidence terminates our inquiry in favor of Michael Foundation, the non-moving party.

The term "composite work" appears in, but is not defined by, the 1909 Act. Composites are related, however, to "compilations," which the Act does define. Compilations are works "formed by the collection and assembling of pre-existing materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship." 17 U.S.C. § 101. The leading treatise on copyright law defines the composite category as a subcategory of compilations, but distinct from compilations in that each individual work within a composite must be independently copyrightable, whereas there is no such requirement for a compilation. *Nimmer on Copyright, § 3.02.* Individual works in a compilation need not come from the same author, as long as they are discrete, independent works. Examples of compilations include periodicals, catalogs, and encyclopedias. Under both the 1909 Act and the 1976 Act, the proprietor of a "periodical, cyclopedic, or other composite work" is entitled to renew the copyright it originally obtained in the work. 17 U.S.C. § 24 (repealed); 17 U.S.C. § 304(a)(1)(B)(i).

Urantia Foundation advances four arguments in support of its contention that *The Urantia Book* is a composite work as a matter of law: (1) *The Urantia Book* is a composite work per se because it is a collection of 196 separate, individually titled papers on a wide variety of topics, most of which the Conduit wrote and delivered separately to the Contact Commission;[8] (2) because the question of whether *The Urantia Book* is a composite work is one of law for the court and *The Urantia Book* was in evidence, this court should disregard the jury's verdict, examine the 2097 pages of *The Urantia Book* itself, and hold as a matter of law that it is a composite work; (3) if the question of whether *The Urantia Book* is a composite work was properly one of fact for the jury, McMullan's testimony should not determine the outcome because he was an accused infringer; and (4) the district court improperly instructed the jury that, when the works of a single author are collected together, the intent of the author determines whether a composite or a unified work results.

In response to the first assertion, Michael Foundation argues that the evidence indicates that *The Urantia Book*

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[8] In support of this argument, Urantia Foundation cites *Urantia Foundation v. Maaherra*, 114 F.3d 955 (9th Cir. 1997), and argues that this court should, in the interests of "principled and intelligible" development of copyright law, follow the Ninth Circuit's lead and hold that *The Urantia Book* is a composite work. We note, however, that the *Maaherra* court's focus was not on the specific question of whether *The Urantia Book* was or was not a composite work; rather, it was on whether Urantia Foundation's erroneous description of itself as the "owner of a work for hire" rather than the "proprietor of a composite work" on its 1983 renewal certificate automatically invalidated the renewal.

is, in fact, a unified literary work by a single author and not a compilation of works selected and arranged by a third party.[9] For example, the jury heard evidence that the Contact Commission did not select or arrange the papers that comprise *The Urantia Book,* but published them precisely as the Conduit presented them. The Conduit also announced, before writing the papers that eventually became *The Urantia Book,* that he would create a book, not a series of separate papers. The jury also heard evidence that, while the individual papers bear separate titles, they are not distinct, unrelated works but chapters of *The Urantia Book,* which the Conduit intended to constitute a unified work. Such evidence satisfies the deferential standard of review applicable to this argument.

We addressed Urantia Foundation's second argument in our discussion of the appropriate standard of review and need not repeat that discussion here. We disagree with Urantia Foundation's third proposition. Its contention that the testimony of McMullan – the person it has sued for infringement – may not be allowed to "determine" the outcome of this case is without merit. The jury was free to consider McMullan's testimony and give it whatever weight it found appropriate; that is the jury's function. Moreover, the jury heard a great deal of testimony, and there is no reason to believe that McMullan's testimony "determined" the outcome. Finally, Urantia

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[9] While composite works typically contain works by multiple authors, we need not reach the parties' debate over whether a work by a single author can be a composite work. The record need only contain evidence sufficient to permit a rational jury to have found that *The Urantia Book* was not a composite work; and, as it does, our inquiry is complete.

Foundation objected to none of the testimony below; thus, if there is an argument to be made here Urantia Foundation has waived it. Fed. R. Evid. 103(a)(1).

Finally, Urantia Foundation argues that the district court improperly instructed the jury that where a single author's works are compiled, that author's intent determines whether the work is unified or a composite.[10] Urantia Foundation properly preserved this objection below, though it failed to provide this court with a citation to the portion of the record containing its objection. An erroneous jury instruction mandates reversal: (1) if we have "substantial doubt whether the instructions, considered as a whole, properly guided the jury in its deliberations," *Morrison Knudsen Corp. v. Fireman's Fund Ins. Co.*, 175 F.3d 1221, 1235 (10th Cir. 1999) (quotation omitted); or (2) "when a deficient jury instruction is prejudicial," i.e., where the jury might have based its verdict on the allegedly defective instruction. *Coleman v. B-G Maint. Mgmt. of Colo., Inc,* 108 F.3d 1199, 1202 (10th Cir. 1997).[11]

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[10] Urantia Foundation also argues that the composite definition instruction was "imbalanced." Urantia Foundation claims to have raised this objection below, but provides no supporting citation to the record. Even if properly preserved, however, we decline to consider this argument, as Urantia Foundation raises the issue outside of its enumerated issues on appeal and relegates discussion of it to a footnote late in the brief. *United Transp. Union v. Dole,* 797 F.2d 823, 827 (10th Cir. 1986) (failure to develop arguments thoroughly in a brief generally waives the argument).

[11] Urantia Foundation does not request reversal; rather, it incorporates its challenge to the jury instruction into its argument that initial classification is a matter of law for the court. Because we disagree with Urantia Foundation on the classification question, we consider its challenge in the usual manner, i.e., as a request for a reversal.

It is not clear whether an author's intent determines the classification of a book comprised exclusively of his own work. The statute and the caselaw are silent on the question. Michael Foundation argues – by analogy to the settled distinction between joint works and collective works, which *is* based upon authorial intent – that intent is, or at least should be, the controlling factor.[12] Because the question appears to be unsettled, we cannot, without settling the question ourselves, say that the district court's articulation of the standard in its jury instruction is erroneous.[13] We need not reach this question, because even

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[12] In support of its assertion that authorial intent governs, Michael Foundation cites (1) the statute, 17 U.S.C. § 101 (defining "joint work" as one "prepared by two or more authors with the *intention* that their contributions be merged into inseparable or interdependent parts of a unitary whole"); (2) legislative history, H.R.Rep. No. 1476, 94th Cong., 2d Sess. 120 (1976) ("The touchstone [for distinguishing between joint works and collective works] is the *intention,* at the time the writing is done, that the parts be absorbed or combined into an integrated unit. . . . "); and (3) *Nimmer on Copyright § 6.05* ("What distinguishes a collective work from a joint work based upon interdependent parts? The distinction lies in the *intent* of each author at the time his contribution is written.") (emphases added). Michael Foundation insists that this question is logically solved by analogy to the settled distinction between joint and collective works – i.e., that it would be "perverse to allow two authors to decide for themselves whether their separate contributions were merged into a [unified] work . . . but deny a single author the right to make that decision." While we appreciate the logical appeal of this analogy, no court has so held; and as sufficient evidence supports the jury's conclusion that *The Urantia Book* is not a composite, we need not reach the question.

[13] The language to which Urantia Foundation objects is as follows:

> Keep in mind that where the works of only one author are involved, the intent of the author is controlling. If the subject authored separate and independent works, each of which was intended to exist on a stand alone basis, and if the Urantia Foundation or its predecessors then assembled

(Continued on following page)

if the instruction overstated the importance of authorial intent, we find no grounds therein for reversal. "We review jury instructions de novo, and must view the instructions in their entirety, deciding not whether the instruction was completely faultless, but whether the jury was misled in any way. Thus, '[w]here a jury instruction is legally erroneous, we must reverse if the jury might have *based its verdict* on the erroneously given instruction.'" *Coleman,* 108 F.3d at 1202 (citation omitted) (emphasis added). We have reviewed the jury instructions in their entirety and find that, taken as a whole, they properly guided the jury. *Id.; Morrison Knudsen,* 175 F.3d at 1235. Especially in light of (1) the fact that the Conduit, being dead, did not testify as to his intentions, leaving the details of those intentions part of the murky history of the composition of *The Urantia Book,* and (2) the fact that the book itself was, as Urantia Foundation points out, in evidence, we see no reason whatsoever to believe that the jury *based its verdict* on the possibly erroneous instruction. *See Coleman,* 108 F.3d at 1202.

The dispositive fact is, simply, that ample evidence was presented to the jury to support its determination that *The Urantia Book* is not a composite work. Viewing the evidence in the record, as we must, in the light most favorable to Michael Foundation, we hold that the district

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those independent works in an order of its own choosing into one collective work that it published as The Urantia Book, then The Urantia Book can be a composite work. By contrast, if the subject intended to author related pieces at different times which the Urantia Foundation or its predecessor published wholesale as The Urantia Book, then The Urantia Book cannot be a composite work.

court properly denied Urantia Foundation's renewed motion for judgment as a matter of law.

4. Commissioned Work

Urantia Foundation alternatively argues that *The Urantia Book* is a commissioned work. If this is so, Urantia Foundation's 1983 renewal as proprietor of the copyright is valid. The 1909 Act did not contemplate "commissioned works." The Act did provide that "in the case of . . . any work copyrighted by . . . an *employer* for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work." 17 U.S.C. § 24 (repealed); 17 U.S.C. § 304(a)(1)(B)(ii) (emphasis added). Urantia Foundation does not argue that a traditional employment relationship existed between the Contact Commission and the Conduit; rather, it argues that the Contact Commission specially commissioned *The Urantia Book* from the Conduit.

The commissioned works doctrine began as a judicially created stopgap, applying the 1909 Act's provisions regarding works created for hire in traditional employer-employee relationships to those created on commission in independent contractor relationships. While the 1976 Act codifies this judicially created doctrine, 17 U.S.C. § 101, the 1909 Act applies to the relationship at issue in this case. Thus, in order to prove a commissioning relationship existed such that Urantia Foundation's 1983 renewal was

valid, Urantia Foundation must satisfy the test developed by the relevant caselaw.[14]

Aside from its question-of-law argument, which we have discussed and rejected *supra*,[15] Urantia Foundation advances three main arguments in support of its contention that the district court erred when it refused to hold as a matter of law that the Contact Commission specially commissioned *The Urantia Book* from the Conduit. We address first Urantia Foundation's belated argument that "the district court's order is . . . based on the erroneous premise that a commissioning party must establish that it had the right to control the content of a work in order for the work to qualify as a commissioned work." Urantia Foundation neglects to mention that it drafted the language upon which the district court relied. For obvious reasons, Urantia Foundation did not object to the instruction below; it has consequentially waived the argument on appeal. Urantia Foundation's disingenuous challenge to its own jury instruction is without merit.

Urantia Foundation next argues that the evidence presented to the jury mandates judgment as a matter of law as to the existence of a commissioning relationship under the "instance and expense" test. We need not resolve the parties' dispute as to whether the proper test includes

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[14] As our discussion *infra* indicates, the parties disagree as to precisely what that test is. Urantia Foundation argues that the test includes only "instance" and "expense" prongs, while Michael Foundation argues that an additional prong requires that the commissioning party have the right to control the content of the work itself.

[15] See Part II.A.2. *supra*.

factors beyond instance and expense. Even under the two-prong test Urantia Foundation urges us to adopt, Urantia Foundation's argument is without merit. Urantia Foundation argues that the "instance" prong is met because the Contact Commission, its predecessor in interest, "solicited, formulated, selected, and submitted questions" to the Conduit and "supervised hundreds of sessions with" the Conduit. The Urantia Papers arose, however, out of the Conduit's psychiatric sessions with Dr. Sadler. The sessions occurred at the Conduit's instance, not Dr. Sadler's. As Michael Foundation correctly points out, in the doctor-patient relationship, the doctor is the patient's fiduciary, not the other way around. Furthermore, the Conduit began writing the Urantia Papers on his own initiative, and "announced to the contact group the plan to initiate the *Urantia Papers*" after having delivered papers of celestial origin to Dr. Sadler for twenty years.[16] The Conduit himself requested the questions from the Contact Commission. The Supreme Court has indicated that the test for whether a work is commissioned applies "at the time the commission is accepted." *Community for Creative Care Non-Violence v. Reid,* 490 U.S. 730, 741 (1989) (discussing general principles of agency law while construing section 101 of the 1976 Act). Upon review of the record, we agree that the Contact Commission's role in creating

[16] The Conduit announced these plans on behalf of, or "as," Machiventa Melchizedek, one of the celestial personalities constituting the "Revelatory Commission," to whom Urantia Foundation ultimately attributes the revelations it believes *The Urantia Book* to embody.

The Urantia Book was "little more than a reaction to an already ongoing process of creation."[17]

Urantia Foundation argues that the "expense" prong is met because of costs incurred in providing stenographic materials, typing the Conduit's handwritten manuscripts, correcting spelling and capitalization errors, and financing the later publication of *The Urantia Book*. But the Conduit produced the papers that comprise *The Urantia Book* alone, in longhand, and one witness testified that the Contact Commission received the information at the Conduit's home. Michael Foundation argues that, "[d]istilled to its essence, Urantia Foundation's argument is that because it acted as publisher of the work and defrayed all expenses in that capacity, the work itself is transmogrified *ex ante* into something produced on commission." We agree that such a view would render most published works "commissioned."

Finally, Urantia Foundation argues that (1) its 1983 renewal certificate, which lists *The Urantia Book* as a "work for hire" and Urantia Foundation as "author," creates a rebuttable presumption that *The Urantia Book* is a commissioned work, and (2) Michael Foundation failed to rebut the presumption.[18] For several reasons, we

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[17] The cases upon which Urantia Foundation relies fail to support its contention that supplying questions to the creator satisfies the "instance" test.

[18] A filed copyright certificate "shall be admitted in any court as prima facie evidence of the facts stated therein." 17 U.S.C. § 209 (repealed). This presumption is rebuttable with evidence showing affirmatively that the copyright is invalid. *Academy of Motion Picture Arts and Sciences v. Creative House Promotions, Inc.*, 944 F.2d 1446, 1451 (9th Cir. 1991).

disagree. First, as we noted above, the "specially commissioned work" doctrine is a creation of courts extending the 1909 Act's "work for hire" provisions to independent contractor relationships. Because federal courts did not apply the work for hire doctrine to commissioned works until after 1965, Urantia Foundation cannot have claimed the work as a commissioned work when it filed its original certificate in 1956. *See Reid,* 490 U.S. at 749 (citation omitted). The certificate cannot be prima facie evidence of a relationship embodied in a common law doctrine not yet created by the courts. Second, the jury's determination, supported by ample evidence, that no commissioning relationship existed, does rebut the presumption.[19]

In short, under the appropriately deferential standard of review, there is ample evidence in the record to support the jury's determination that no commissioning relationship existed between the Conduit and the Contact Commission. The district court, therefore, did not commit reversible error when it denied Urantia Foundation's renewed motion for judgment as a matter of law on the

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[19] Michael Foundation argues that Urantia Foundation has waived this particular formulation of the issue by failing to request a jury instruction as to the rebuttable presumption argument. We agree that, to the extent that a specific instruction as to the presumption of validity would have induced the jury to require *more* evidence than it otherwise would have before finding that the Conduit did not write *The Urantia Book* under commission from the Contact Commission, Urantia Foundation has obviously waived the issue. We need not reach the details of Michael Foundation's waiver argument, however, as the presumption was amply rebutted by: (1) the logical impossibility of the certificate creating a presumption in favor of a relationship not recognized by the law when the certificate was recorded; and (2) more importantly, the jury's finding, supported by adequate evidence, that no commissioning relationship existed.

question of whether its predecessor in interest commissioned the Conduit to create *The Urantia Book*.

B. Exclusion of Barbara Newsom's Testimony on Grounds of Unfair Surprise

Urantia Foundation moved below for a new trial based upon the district court's exclusion of Barbara Newsom's testimony on grounds of unfair surprise. The district court denied the motion, and Urantia Foundation on appeal asserts that this was error requiring us to remand the case to the district court for a new trial. We review the denial of a motion for a new trial for a manifest abuse of discretion. *Aguinaga v. United Food & Commercial Workers Int'l Union*, 993 F.2d 1463 (10th Cir. 1993), *cert. denied*, 510 U.S. 1072 (1994).

Urantia Foundation proffered testimony from Newsom that the Conduit "was aware of the Urantia Papers, knew of the Contact Commission's intent to publish them, and disclaimed any copyright in the papers." Newsom's testimony would have been based upon secret journals purportedly prepared by Dr. Sadler and kept in a locked file cabinet until their unexplained disappearance in 1979. Newsom would have testified that she examined the journals twenty years earlier while researching a history that she was writing about the Urantia movement. The district court excluded the evidence on the ground that it would unfairly surprise Michael Foundation. Michael Foundation contends that the admission of the secret journals would have been prejudicial to it because the Joint Pre-trial Report did not adequately prepare it for the testimony, which Urantia Foundation offered four and one-half days into trial, after Michael Foundation had rested.

We agree. Urantia Foundation's contention that Michael Foundation would not have been unfairly surprised seems disingenuous, given that Urantia Foundation's own counsel claimed ignorance of Newsom's potential testimony as to the purported secret journals until the Friday night before the Monday morning on which Urantia Foundation offered her testimony. Urantia Foundation points to the Final Joint Pre-trial Report, which indicated that Newsom would testify "as to the matter in which 'The 50 Years' anniversary document was prepared, matters relating to the origin of *The Urantia Book*." Urantia Foundation asserted that this adequately prepared Michael Foundation for Newsom's testimony. But that report was prepared before even Urantia Foundation's own counsel knew of the existence of the purported secret journals; given the particular nature of the proffered testimony, it therefore appears likely that Michael Foundation did not receive adequate notice.

Exclusion of evidence at trial is within the sound discretion of the trial court; thus "an evidentiary ruling will be reversed only on a showing that the trial court abused its discretion." *Kloepfer v. Honda Motor Co.*, 898 F.2d 1452, 1456 (10th Cir. 1990) (citation omitted). Newsom's testimony was announced well into the trial, after Michael Foundation had rested. It concerned the contents of purported secret journals, purportedly kept in locked filing cabinets, until their purported mysterious disappearance over twenty years ago, and purportedly contained evidence highly injurious to Michael Foundation's case. Suffice it to say that we do not find the district court's exclusion of Newsom's testimony to have been an abuse of its broad discretion.

III. CONCLUSION

Viewing the evidence in the light most favorable to Michael Foundation, we find that substantial evidence supports the jury's determination that *The Urantia Book* is neither a composite nor a commissioned work. We therefore AFFIRM the district court's denial of Urantia Foundation's renewed motion for judgment as a matter of law. Because the trial court did not abuse its broad discretion in excluding, on grounds of unfair surprise, the testimony of Barbara Newsom as to the contents of purported secret journals, we AFFIRM the district court's denial of Urantia Foundation's motion for a new trial.

ENTERED FOR THE COURT,

Deanell Reece Tacha
Chief Circuit Judge

McWILLIAMS, Senior Circuit Judge, dissenting.

In my view, the district court erred in denying Urantia Foundation's motion for judgment, n.o.v. I hold that the Urantia Foundation's renewal copyright is valid and enforceable as a matter of law. *See Urantia Foundation v. Maaherra,* 114 F.3d 955 (9th Cir. 1997).

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

MICHAEL FOUNDATION, INC., a Foreign Corporation, Plaintiff and Defendant-in-Counterclaim, v. URANTIA FOUNDATION, an Illinois Charitable Trust, Defendant and Counterclaimant, -AND- URANTIA FOUNDATION, Counterclaimant and Third Party Plaintiff, v. HARRY McMULLAN III, a citizen of Oklahoma, Third Party Defendant, and MICHAEL FOUNDATION, INC., a Foreign Corporation, Defendant-in-Counterclaim.	Case No. CIV-00-885-W

ORDER

(Filed Aug. 14, 2001)

Before the Court is Urantia Foundation's Motion for Judgment Notwithstanding Verdict filed on July 6, 2001. The motion seeks to have the Court to set aside the verdict and enter judgment as a matter of law in favor of Urantia

Foundation. Michael Foundation Inc. ("Michael Foundation") opposes the motion and filed an opposition brief on August 3, 2001.

> This matter was tried before a jury in June, 2001. At the close of the evidence, each party moved for judgment as a matter of law in their favor. All such motions were denied at that time. The case was submitted to the jury and a verdict was duly rendered. The jury found that the copyright held by Urantia Foundation on *The Urantia Book* was invalid; the jury also found against Urantia Foundation on both its claim of copyright infringement against Michael Foundation and its claim of contributory copyright infringement against Harry McMullan, III ("McMullan"). The Court entered judgment in this case on June 21, 2001.

Urantia Foundation's current motion is made pursuant to Fed.R.Civ.P. 50(b). Rule 50(b) allows a party who has previously moved for judgment as a matter of law at the close of the evidence to renew its motion within ten days after entry of judgment. Judgment as a matter of law is appropriate "only if the evidence points but one way and is susceptible to no reasonable inferences which may support the opposing party's position." *Tyler v. RE/MAX Mountain States, Inc.*, 232 F.3d 808, 812 (10th Cir. 2000) (citing *Finley v. United States*, 82 F.3d 966, 968 (10th Cir.1996)). In reviewing the motion, a court must review all the evidence in the record, construe the evidence and inferences most favorably to the nonmoving party, and refrain from making credibility determinations and weighing evidence. *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 150 (2000).

Urantia Foundation makes two main arguments. Urantia Foundation's first argument is that, as a matter of

law, *The Urantia Book* is a commissioned work. In arguing that *The Urantia Book* is a commissioned work, Urantia Foundation argues that *The Urantia Book* meets the test for a commissioned work because 1) it was created at the insistence and expense of the Contact Commission, 2) the Contact Commission had the right to control and supervise the creation of the work, and 3) Urantia Foundation had registered the copyright. In addition, Urantia Foundation asserts that Michael Foundation and McMullan failed to show that the Subject intended to retain rights in the works and that the destruction of the original manuscripts does not refute the existence of a commissioning relationship.

The Court addresses each of issues relating to a commissioned work in turn. In addressing Urantia Foundation's insistence and expense argument, Michael Foundation argues that a wealth of evidence was presented at trial to show that the Subject was the one who initiated the Urantia Papers and that the Contact Commission did little to fund the original creation of the work. Specifically, the Subject was not compensated for his role in creating *The Urantia Book*. While payment is not the determinative factor in determining whether a commissioning relationship exists, it is a factor that is closely examined. *See e.g., Forward v. Thorogood*, 985 F.2d 604, 606 (1st Cir. 1993).

As to the issue of control, Michael Foundation argues that the evidence presented at trial shows that the Contact Commission exercised no actual control over the creation process. Specifically, evidence was presented to show that while the Contact Commission asked questions of the Subject, it had no control as to 1) how the questions were answered or 2) the format of the responses. Urantia

Foundation argues that the test is not whether the Contact Commission exercised control, but whether it had the *right* to exercise control. *Murray v. Gelderman*, 566 F.2d 1307, 1310 (5th Cir. 1978). The Court finds that even if the evidence is examined under the *Murray* test, there is sufficient evidence to support a conclusion that the Contact Commission could not exercise control over the process.

Michael Foundation next addresses Urantia Foundation's argument that the copyright registration certificate is prima facie proof that *The Urantia Book* is a commissioned work. Michael Foundation argues that once evidence is presented to rebut the prima facie case of validity, the burden shifts back to the copyright owner. *Gardenia Flowers, Inc. v. Joseph Markovits, Inc.*, 280 F.Supp. 776, 781 (S.D.N.Y. 1968). Michael Foundation points to the stipulation that the Subject authored the book and the fact that the Urantia Foundation did not exist as an entity as proof offered to rebut the presumption of validity. In addition, as previously stated, evidence was presented to show that Urantia Foundation did not 1) initiate the process of creating the work, 2) expend funds to create the work, or 3) have the ability to control the work. Michael Foundation argues that this evidence is sufficient to rebut the copyright registration's presumption of validity.

Michael Foundation next responds to Urantia Foundation's argument that when evidence of a commissioning relationship has been shown, the burden falls on the independent contractor to establish that a contrary agreement had been reached. *Playboy Enterprises, Inc. v. Dumas*, 53 F.3d 549, 554-55 (2nd Cir. 1995). In the present case, sufficient evidence was presented to enable a jury to

find that no commissioning relationship existed. Therefore, Michael Foundation and McMullan did not have to prove that the Subject reached an agreement to retain rights to his work.

Urantia Foundation's final argument with respect to commissioned works is that Michael Foundation should not benefit from any negative inference drawn from the destruction of the original manuscripts of the Urantia Papers. The Court has reviewed this argument along with the others presented by Urantia Foundation and finds that ample evidence was presented to support the jury's finding that *The Urantia Book* was not a commissioned work or work for hire. Having viewed the evidence in the light most favorable to the nonmoving party, and finding that reasonable inferences drawn from the evidence could reasonably support the jury's verdict, the Court finds that judgment as a matter of law should not be granted to Urantia Foundation on the issue of commissioned works or works for hire.

Urantia Foundation's second main argument is that *The Urantia Book*, as a matter of law, is a composite work. In support of its argument, Urantia Foundation claims that 1) *The Urantia Book* is a composite presentation of 196 separate papers, 2) *The Urantia Book* is an encyclopedic work, and 3) the Contact Commission selected and arranged material. Michael Foundation disputes these claims and asserts that evidence was presented to show that *The Urantia Book* was a unified literary work and that, because *The Urantia Book* is not a collection of separate works, it cannot qualify as an encyclopedia. 17 U.S.C. § 101 (stating that an encyclopedia is an example of a collective work). Michael Foundation disputes Urantia Foundation's final assertion by pointing to evidence in the

record showing that the Contact Commission did not arrange or select any of the material that makes up *The Urantia Book*. Upon review of the record, and having viewed the evidence in the light most favorable to the nonmoving party, the Court finds that judgment as a matter of law should not be granted to Urantia Foundation on the issue of composite works.

For the reasons stated more fully above, the Court DENIES Urantia Foundation's Motion for Judgment Notwithstanding the Verdict.

ENTERED this 14th day of August, 2001.

/s/ Lee R. West
LEE R. WEST
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

MICHAEL FOUNDATION, INC., a Foreign Corporation, Plaintiff and Defendant-in-Counterclaim, v. URANTIA FOUNDATION, an Illinois Charitable Trust, Defendant and Counterclaimant, -AND- URANTIA FOUNDATION, Counterclaimant and Third-Party Plaintiff, v. HARRY McMULLAN III, a citizen of Oklahoma, Third-Party Defendant, and MICHAEL FOUNDATION, INC., a Foreign Corporation, Defendant-in-Counterclaim.	Case No. CIV-00-885-W

ORDER

(Filed Jun 8, 2001)

I. Introduction

Before the Court is the Motion for Partial Summary Judgment filed by defendant Urantia Foundation on March 1, 2001. The motion seeks to have this Court declare certain copyrights and trademarks to be valid and

enforceable. The remaining parties to this suit, Harry McMullan, III and Michael Foundation, Inc., oppose the motion and filed a response brief on March 30, 2001. The Court allowed Urantia Foundation to file a reply brief on April 13, 2001, and subsequently allowed all parties to file surreply briefs with the Court. These surreplies were filed in early May, 2001. The Court carefully considered all briefs, along with all supporting materials, in resolving the motion for partial summary judgment as detailed below.

Case History

This case arises from a complaint for declaratory relief filed by Michael Foundation, Inc. ("Michael Foundation") on May 12, 2000. The complaint sought a declaration that the copyright held by the Urantia Foundation was invalid. Urantia answered the complaint on June 16, 2000, and brought certain claims against Michael Foundation and Harry McMullan, III, a third party to the suit. Mr. McMullan answered the allegations on August 2, 2000.

This manner of bringing claims and counterclaims results in a somewhat convoluted orientation of the parties. Michael Foundation stands in the position of plaintiff and defendant-in-counterclaim; Urantia Foundation is the defendant and counterclaimant with respect to Michael Foundation and the third party plaintiff with respect to Mr. McMullan. Mr. McMullan is the third-party defendant in this case. Because the party orientation is somewhat complex, the Court will refer to the parties by name in an attempt to clarify the discussion of the issues.

As stated previously, this case was filed in May, 2000. Since that time, the parties have had ample time to

conduct discovery. In fact, at the request of the parties, various discovery deadlines were extended and additional briefing was allowed by the Court in an attempt to fully explore the issues in this case. In a further attempt to accommodate the parties, the Court continued this matter from its originally scheduled April trial date to this Court's June trial docket. Currently, this matter is scheduled to begin trial on June 12, 2001.

Essence of Dispute

Michael Foundation's complaint seeks a declaration that the copyright held by Urantia Foundation on *The Urantia Book* is invalid and unenforceable. In the alternative, Michael Foundation seeks a declaration that its actions did not infringe Urantia Foundation's copyright.

In response, Urantia Foundation brought claims against both Michael Foundation and Mr. McMullan thereby making them a defendant in-counterclaim and third-party defendant respectively. Urantia Foundation's counterclaims sought 1) a finding that Michael Foundation was liable for copyright infringement, 2) a finding that Michael Foundation violated the provisions of the Anti-Cybersquatting Act, 3) a finding that Mr. McMullan is liable for contributory copyright infringement, 4) a finding that both Michael Foundation and Mr. McMullan engaged in unfair competition and deceptive trade practices, and 5) punitive damages.

The motion for partial summary judgment currently at issue only addresses some of the issues in this case.[1] The motion requests the Court to find Urantia Foundation's copyright on *The Urantia Book* to be valid and enforceable. The motion also seeks a finding that four trademarks held by Urantia Foundation for the Mark Urantia® and one trademark for the mark Urantia® are valid and enforceable. No other issues in this case are considered in the motion for partial summary judgment.

Legal Standards

Summary judgment may be granted only where there are no material issues of fact and the moving party is entitled to judgment as a matter of law. *Allstate Ins. Co. v. Brown*, 920 F.2d 664, 668 (10th Cir. 1990); FED.R.CIV.P. 56(C). Summary judgment is appropriate "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). When deciding a motion for summary judgment the Court must examine the record and should draw all reasonable inferences therefrom in favor of the non-moving party. *19 Solid Waste Dep't. Mechs. v. City of Albuquerque*, 146 F.3d 1068, 1071 (10th Cir. 1998).

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[1] Michael Foundation and Mr. McMullan cite *Goldstein v. Fidelity & Guaranty Insurance Underwriter, Inc.*, 86 F.3d 749 (7th Cir. 1996), for the proposition that the Court may grant summary judgment to a non-moving party if the circumstances warrant it. In the present case, the Court finds the circumstances do not warrant such an action.

II. Background

History of the Urantia Movement

In order to understand the issues in the proper context, a brief examination of the history of the Urantia movement is necessary. Much of the history behind the origin of the movement is unclear; what is known of the origins of the Urantia Foundation comes from the history recited in *The Urantia Book* itself.

Apparently, as early as 1924, a Dr. William Sadler, a psychiatrist in Chicago, came into contact with one of his patients whom he believed to be in contact with otherworldly spiritual beings. There is some dispute as to whether the patient was merely a conduit for channeling the spiritual beings or whether he was merely divinely inspired by them.[2] While there is some dispute as to the nature of the patient's communication with the spiritual beings, the Court will refer to the patient as the "Conduit" to signify the shared belief of all parties to this suit that the patient's communications had some divine significance. Very little else is known about the patient; the patient's identity, to the extent it was known, was never revealed. It is known, however, that the patient is now deceased having passed away sometime prior to 1977.

In order to better understand the communications with the Conduit, Dr. Sadler formed a group of five or six followers, called the Contact Commission. Dr. Sadler was the acknowledged leader of the Contact Commission. Initially, they discussed the teachings among themselves;

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[2] This dispute is treated in further detail in section III, *Infra*.

later, in response to what they believed to be prompting by the Conduit, the Contact Commission created a group known as the Forum to help formulate questions that were then posed to the Conduit. The Contact Commissioners supervised the Forum's activities and participated in question formulation themselves. The Forum met at Dr. Sadler's residence on Sundays where the communications with the Conduit were read aloud. The Forum members then formulated questions to submit to the Conduit. The Contact Commission then reviewed the questions and selected the questions that would be posed.

After the questions were submitted, a response paper would appear. Little is known about the exact nature of the appearance of the Papers; however, there seems to be no dispute among the parties that this question/answer procedure produced manuscripts that became known as the Urantia Papers. This process of posing questions and receiving answers continued for over fifteen years during which one hundred ninety six Papers were produced. Papers 120-196, which comprise Part IV of *The Urantia Book* came about in a slightly different manner. Part IV apparently arrived as a single unit as opposed to arriving individually as the other Papers were received. In addition, Part IV appears to have been completed one year later than the other Papers. The Court takes special note of the different origin of Part IV because this is the section of *The Urantia Book* that Michael Foundation copied in the allegedly infringing work *Jesus – A New Revelation*.

Upon receipt of the manuscripts from the Conduit, the Contact Commission typed up the manuscripts and destroyed the originals. The parties agree that no substantial changes were made to the Papers by the Contact Commission during the process of transcription. MF Facts

¶ 8. The Contact Commission contacted R.R. Donnelly Publishing to manufacture the plates for printing the Urantia Papers in 1941.

The Contact Commission ceased to be the decision making or custodial body with respect to the Urantia Papers upon the formation of Urantia Foundation in 1950. The Contact Commission assigned the rights to the printing plates to Urantia Foundation as well as assigning all rights to *The Urantia Book* by a declaration of trust. UF Facts ¶¶ 31, 23. The Urantia Foundation then published *The Urantia Book*, under notice of copyright, in 1955.

The Book

The Urantia Book has four main parts that consist of the one hundred ninety six numbered Urantia Papers. In addition, *The Urantia Book* contains titles for each of the Papers and a detailed table of contents. The Papers are a "repository of information on a number of subjects" including anatomy, anthropology, biology, chemistry, history, and philosophy, among others.

As noted above, Urantia Foundation copyrighted *The Urantia Book* upon its publication in 1955. In obtaining federal statutory copyright on the book, Urantia Foundation complied with the requisite formalities including 1) publication with notice of copyright and 2) deposit of copies of *The Urantia Book* with the government. The copyright certificate that issued named Urantia Foundation as the author and claimant of the work. Because the copyright was obtained under the provisions of the 1909 Copyright Act, the initial copyright term was for a period of 28 years. The Urantia Foundation renewed its copyright in *The Urantia Book* in 1983. The renewal certificate

stated the basis for renewal was that Urantia Foundation was the proprietor of a "work for hire" and thus entitled to renew the copyright.

Previous Litigation

The copyright at issue in this case has been litigated twice previously. Originally, the Western District of Michigan examined the original copyright in *Urantia Foundation v. Burton*, 210 U.S.P.Q. 217 (W.D. Mich. 1980). The Ninth Circuit has also examined the copyright, in its renewal term, in *Urantia Foundation v. Maaherra*, 114 F.3d 955 (9th Cir. 1997). Since two separate courts have examined the copyright in similar, though not identical, circumstances, a brief review of these courts' previous holdings is instructive.

In *Burton*, the district court found that the patient had authored the work and therefore held a common law copyright in the content of the Urantia Papers. *Burton*, 210 U.S.P.Q. at 217. Because common law copyright vests immediately with the author upon the creation of a work, the district court found that the patient held a common law copyright in the content of the Urantia Papers. Under the provisions of the 1909 Copyright Act, a work protected by common law copyright became entitled to statutory protection upon its publication under notice of copyright. The court found there had been an oral transfer of the common law copyright from the patient to the Contact Commission. The court made this finding by relying upon evidence showing that Dr. Sadler maintained complete control of the Urantia Papers, this control coupled with assertion of an oral transfer of rights was sufficient for the court to find Urantia Foundation possessed the common

law rights to the Urantia Papers when they were published in *The Urantia Book* in 1955. *Id.* at 221. Because Urantia Foundation was the assignee of the common law copyright, the court held that it was irrelevant that the copyright certificate listed Urantia Foundation as the author rather than the assignee. The court found this to be a mere technicality because, as the assignee, Urantia Foundation would nevertheless be entitled to copyright protection. The *Burton* court made no finding as to the nature of the work (unified, composite, etc.). The court merely found that Urantia Foundation's original copyright in *The Urantia Book* was valid.

In *Maaherra*, the Ninth Circuit examined the validity of Urantia Foundation's copyright renewal in *The Urantia Book*. The court first held that Urantia Foundation's original copyright in *The Urantia Book* was valid. By formulating questions which shaped the content and arrangement of the information in the Papers, the Contact Commission contributed the requisite level of creativity required for copyright protection. The Ninth Circuit traced the common law copyright in the Urantia Papers back to the Contact Commission – not back to the Conduit as the *Burton* court had done. The court found that by contributing to the arrangement and selection of the Papers, the Contact Commission was entitled to a common law copyright in the compilation of the revelations contained in the Papers themselves. *Maaherra*, 114 F.3d at 959. The court said that "the Papers were therefore protected from the moment they were created by the members of the Contact Commission until publication of the Book." *Id.* at 960. The court further stated that the trust instrument creating the Urantia Foundation clearly transferred all rights in the

Papers from the Contact Commission to Urantia Foundation. *Id.*

Because the work, as assigned to Urantia Foundation, was a compilation, and all the rights were transferred from the Contact Commission to the Urantia Foundation, the Foundation was considered to be a "proprietor" within the meaning of the Copyright Act. As a proprietor, Urantia Foundation was entitled to renew the composite copyright in the book.[3] *Id.* at 960; 17 U.S.C. § 304(a) (1983).

The key to understanding the holding in *Maaherra* is to understand that the court only held that Urantia Foundation was an assignee of the copyright in the compilation of the revelations that comprise *The Urantia Book*. *Maaherra*, 114 F.3d at 959. This is notably different from holding that Urantia Foundation held a copyright in the content of the revelations themselves. Under the *Maaherra* holding, a third party could copy individual revelations without violating Urantia Foundation's copyright. *Id.* at 959.

III. Basics of Copyright Law

Copyright Framework

A copyright is a property right of an author to control the reproduction of his intellectual creation. REP. OF THE REG. OF COPYRIGHTS ON THE GEN. REVISION OF U.S. COPYRIGHT L. (1961) pp. 3-6. Congressional power to grant

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[3] The Ninth Circuit also held that though the renewal application for the work listed it as a work for hire rather than as a composite work, the renewal certificate was still valid. *Maaherra*, 114 F.3d at 963.

copyright protection stems from the Constitution itself. Article I of the Constitution states that "Congress shall have the power . . . to promote the Progress of Science and the Useful Arts, by securing for limited Times to Authors and inventors the exclusive right to their respective Writings and Discoveries." U.S. Const. art. I, § 8. By allowing authors exclusive control of their own works for limited times, copyright law provides an incentive for authors to continue to produce intellectual works.

Because copyright is a complex area of the law that has undergone many changes over time, the Court feels a brief overview of the applicable law will aid in the understanding of the issues at hand. Congress has at various times passed revisions of the copyright law that change the nature and scope of the protections afforded to authors. These protections have changed both with the passage of time and the progress of technology. While the law as detailed below is meant to help put the issues in this case in historical context, it is by no means meant to be a detailed discourse on copyright law.

Prior to the enactment of a federal copyright law, common law governed the scope of available protections. Different states afforded different protections to the authors. Robert A. Gorman and Jane C. Ginsberg, *Copyright for the Nineties*, 5 (1993) [hereinafter *Copyright for the Nineties*]. Common law copyright survived the enactment of the federal copyright statute; common law copyright simply becomes pre-empted once the requirements of the federal copyright statute are met. *Id.* at 7.

The first copyright act in the United States was enacted in 1790. Initially, the Copyright Act protected maps, charts, and books for a period of fourteen years.

Provision was made in the original act to allow for a renewal term of an additional fourteen years. The 1790 act was revised through the years. In 1831, the initial term was extended to 28 years. *Copyright for the Nineties* at 7. The act was also amended at various times to protect additional subject matter. Prints were given protection in 1802, musical compositions in 1831, photographs in 1865, and paintings, drawings, sculptures and models were given protection in 1870. The right to control public performances was also added through the years. The right to control the performance of dramatic compositions was granted in 1856, and the right to control the performance of musical compositions was granted to authors in 1897.

The first major overhaul of the U.S. Copyright Act was completed in 1909. Because the work at issue in this case was developed in the 1920s 1930s, and was published in 1955, the 1909 Act is the act under which copyright protection was initially granted to *The Urantia Book*. The basic provisions of the 1909 act expanded the subject matter entitled to copyright protection to include "all writings of an author." *Copyright for the Nineties* at 9. The 1909 Act also set some formalities for federal statutory copyright protection; a work had to be published with notice of copyright to get statutory protection. *Id.* The 1909 Act also further extended the renewal term of the copyright by another 14 years bringing the total length of possible copyright protection to a total of 56 years. The provisions of the 1909 Act were somewhat complex; the courts issued a variety of decisions in an attempt to interpret the 1909 Act – many of which were conflicting.

The Copyright Act was revised again in 1976. In contrast to the 1909 Act, the 1976 Act required no formalities to obtain copyright protection: Statutory protection

was afforded from the moment the work was "fixed in a tangible medium." 17 U.S.C. § 102. For the first time, statutory protection became available for unpublished works. *Copyright for the Nineties* at 11. In addition, the 1976 Act replaced the cumbersome renewal process with a single, lengthier, copyright term. Currently, the 1976 Act affords protection for the life of the author plus 70 years.[4] 17 U.S.C. § 302. The 1976 Act also recognized certain fair use rights and established some compulsory license requirements.

The 1976 Act has also been amended over the years. Notice of copyright is now optional rather than required. *Copyright for the Nineties* at 12. Other provisions of the act have been amended through the years by Congressional passage of 1) the Visual Artists Rights Act (1990), 2) the Architectural Works Copyright Protection Act (1990), 3) the Computer Software Rental Amendment (1990), 4) the Audio Home Recording Act (1992), 5) the Digital Millennium Copyright Act (1998), and the Sonny Bono Copyright Term Extension Act (1998).

While the scope of copyright protection has changed over the years, the fundamental concepts behind copyright law have not. The key to copyright law is that it protects expression, not ideas themselves. *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 372 (1991). This expression/idea dichotomy results from the distinction between creation and discovery. The first person to "find and report a particular fact has not created the fact; he or

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[4] While this is the basic copyright term, varying terms of copyright are provided for various types of copyrights. 17 U.S.C. § 302.

she has merely discovered its existence." *Id.* at 347. Discovering facts requires no originality; the expression of those facts does.

To gain copyright protection, the work must be a product of original authorship and be fixed in some tangible form. 17 U.S.C. § 102. The originality requirement, though constitutionally mandated, is not a difficult test to meet. All that is required is some minimal degree of creativity. *Id.* at 362. The fixation requirement comes from § 102 of the current act and mandates that to obtain copyright protection, the work must be "fixed in any tangible medium of expression." 17 U.S.C. § 102.

Types of Works Protected

In addition to meeting the originality and fixation requirements, the work must be of a type eligible for copyright protection. Generally, protection is afforded to literary, artistic, and musical works. Some additional types of works also are eligible for protection under the copyright statutes. For example, compilations, derivative works, pictorial, graphical, and sculptural works are all protected by copyright. Derivative works are works that are consciously based on pre existing works. 17 U.S.C. § 101. They may incorporate part of the work while significantly adding to it. For example, dramatic adaptations, and translations generally qualify as derivative works. Pictorial, graphic, and sculptural works are fairly self explanatory; they too are protected by copyright law.

Compilations are one of [sic] easiest types of copyright to define, yet one of the most difficult to apply. Compilations are "works formed by the collection and assembling of

pre-existing materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship." 17 U.S.C. § 101. A good example of a compilation is a collection of essays. While the contributing authors hold a copyright in their individual works, the anthology publisher holds the copyright in the collection itself. Generally, the publisher does not automatically gain a copyright in the underlying material merely by publishing the compilation.[5] This result flows from the originality requirement, because a person who produces a compilation does not contribute to the expression of the works that make up the compilation, he is not entitled to a copyright in the underlying works.

A subcategory of compilations is known as composite works. While a compilation may be made up of a collection of any sort of information, the works that make up a composite work must each be independently copyrightable. D. Nimmer and M.D. Nimmer, *Nimmer on Copyright*, 3.02 [hereinafter *Nimmer*]. The works need not be from the same author as long as they are discrete writings. *Id.* While there is no bright line as to how many works need to be included for a work to be considered a composite work, when relatively few works are brought together, they do not qualify as a composite work. H. Rep. 94-1476, p. 122; *Nimmer,* 3.02; *Cormack v. Sunshine Food Stores, Inc.,* 675 F.Supp. 374, 378 (E.D. Mich. 1987).

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[5] This is generally the case. However, under the case law that developed under the 1909 Copyright Act, the proprietor of the compilation also got rights in the underlying works. This issue is treated in more detail below.

Joint works differ from compilations in that they are works "prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." 17 U.S.C. § 101(a). This definition under the current act is slightly more restrictive than the test for joint works under the 1909 Act. Under the old law, the author need not intend that the work be a joint work while writing it; subsequent intent that the work be joint was sufficient. *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.,* 221 F.2d 569 (2nd Cir. 1955). The effect of a joint work is that the authors are the co-owners of the copyright in the work. *Community for Creative Non-Violence v. Reid,* 846 F.2d 1485, 1498 (D.C. Cir. 1988).

Copyright Ownership

Copyright ownership is itself a complex area of the law. Under the provisions of the current act, copyright protection vests in the author the moment the work is fixed in a tangible medium. 17 U.S.C. § 201(a). Under the 1909 Act, common law protection vested in the author upon the creation of the work. *Nimmer*, 1.01[A]. This common law right gave the author control over the fist publication of the work. Once the work was published, the protections of common law copyright ceased to exist. *Id.* at 1.01[B]. Two things could happen upon publication under the 1909 Act. If the formalities (notice, deposit, etc.) required by the 1909 Act were complied with, the work received federal statutory protection. However, if the formalities were not followed, the work fell into the public domain.

While the general rule is that the copyright vests in the author of a work, a number of exceptions apply. Two of those exceptions, works for hire and collective works, may be applicable to the facts of this case. Works for hire are works in which the employer owns the copyright in the work developed by his/her employee. The current law defines a work for hire as a "1) work prepared by an employee within the scope of his or her employment; or 2) a work specially ordered a commissioned for use as a contribution to a collective work, . . ." 17 U.S.C. § 101. This elaborate definition of a work for hire is the result of tangled case law on the subject under the provisions of the 1909 Act. Robert A. Gorman, *Copyright Law*, 50 (1991).

While the law concerning works for hire under the 1909 Act is complex, the old definitions of ownership still apply for works created under the old copyright act. *Roth v. Pritikin*, 710 F.2d 934, 937 (2nd Cir. 1983). The 1909 statute provided for works for hire by stating that "the word 'author' shall include an employer in the case of works made for hire." 17 U.S.C. § 26 (1909). However, the Act defined neither employer nor "work for hire." Under the case law interpreting the 1909 Act, two basic definitions arose regarding works for hire. The first line of cases dealt with employee works. Under this line of cases, the employer got protection for works made by their employees in the regular course of business. *Community for Creative Non-Violence v. Reid,* 490 U.S. 730, 744 (1989). The other line of cases dealt exclusively with commissioned works. *Id.* As stated previously, the law surrounding works for hire under the old Act is complex; the Court need not delve further into this area to address the issues currently before it.

Collective works represent another of the exceptions to the general rule of ownership. While collective works are not defined under either the 1909 or the 1976 Act, it appears clear that the term "collective works" is synonymous with "composite works." *Shapiro*, 123 F.2d at 697; *Nimmer*, 9.03[B]. The Court therefore uses the terms "collective works" and "composite works" interchangeably.

Currently, a copyright in a collective work only protects the work added to make it. This results from the current rule that vests copyright protection with the author upon fixation of the work in a fixed medium. Under the law as it exists today, the original authors retain the copyright in the pieces that make up the composite work. The producer of a collective work needs to obtain licenses from the original authors to allow the reproduction of the original works. 17 U.S.C. § 201(c).

Once again, the law under the 1909 Act was problematic. Under the old law, the common law copyright initially vested in the author. Under this scheme, two situations could arise for collective works. First, if the author obtained statutory copyright on his work (by publishing under notice of copyright) before the work was published in the collection, the result was the same as under the current law. The author retained the copyright in the original work and the producer of the collective work had a copyright in the collective work only.

The second scenario is slightly more complex than the first. Unlike the current system, oral transfers of copyright rights were allowed under the old law. *Nimmer*, 10.03[B][2]. A copyright was considered to consist of a "bundle of rights" that included the right to publish in a book, the right to radio broadcast, etc. *Nimmer*, 10.01[A].

Under the old law, the bundle of rights could not be separated; thus, any transfer of copyright rights included all rights of publication. *Id.* Thus, it became imperative to know the nature of the transfer of the common law copyright.

If the author intended to transfer the whole bundle of rights to the producer of the composite work, then the producer was considered to be the proprietor/assignee of all rights to the underlying work. In this case, the proprietor got not only the copyright in the compilation, but he received the copyright in the content of the underlying works as well. *Nimmer*, 5.01[B]; *see also American Tobacco v. Werckmeister*, 207 U.S. 284 (1907).

If the author only intended to transfer a single right (i.e. the right to publish the work in a magazine, etc.) the producer of the composite work was only a licensee. In this case, the producer did not get a copyright in the underlying material; he only could apply for a copyright in the composite work itself. The author would get a copyright in the original underlying work by the operation of a judicially created doctrine called a "beneficial copyright." *Nimmer*, 10.01(C)(2); *Goodis v. United Artists Television, Inc.*, 425 F.2d 397, 399 (2nd Cir. 1970).

Copyright Renewal

The 1909 Act also provided detailed provisions governing renewal procedures. The ability to renew a statutory

copyright was a part of the U.S. copyright laws until 1976.[6] The purpose of allowing a renewal of the copyright term was to allow the author an opportunity to realize the importance of his work after some time had elapsed. *Fred Fisher Music Co., Inc. v. M. Witmarek & Sons,* 318 U.S. 643, 653 (1943). While the renewal term served an important purpose, renewal was a problematic procedure. H.R. Rep. No. 94-1476. Difficult questions arose as to who could renew the copyright and whether the right to renew could be transferred. Because of the difficulty inherent in the renewal process, it was eliminated in the 1976 revisions.

The general rule on renewal was that authors could renew their initial 28 year copyright term for an additional 28 years. The right to renew a work fell to different parties depending on the circumstances. 17 U.S.C. § 24 (1909); 17 U.S.C. § 304(a)(1)(C) (2001). If the author transferred the renewal right and was still living when the time for renewal arose, the transferee kept the right to renew the copyright. If, however, the author passed away during the first term the transfer of the renewal right was void. *Fred Fisher Music Co.,* 318 U.S. 643 (1943). If the author passed away during the first term of the copyright, the right to renew passed first to the author's heirs, then to the executors of the estate, and finally to the author's next of kin. 17 U.S.C. § 304(a)(1)(C). The author could not divest his heirs of the right of renewal if he died during the first term of the copyright. *Miller Music Corp. v. Charles N. Daniels, Inc.,* 362 U.S. 373, 374 (1960.) If the copyright was in its first term when the 1976 Act went

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[6] Provisions do still exist, however, to allow for the renewal of pre-1976 works. 17 U.S.C. § 304.

into effect, the copyright had to be renewed according to the provisions of section 304(a)(1)(C) or the work would fall into the public domain.

As with most aspects of copyright law, there are exceptions to the general rules on renewal. When the 1976 Act was passed, provisions were made to allow the proprietor[7] of a copyright to renew in certain circumstances. A proprietor is entitled to renew the copyright in 1) posthumous works, 2) periodic, cyclopedic, or other composite works, 3) works copyrighted by a corporate body, and 4) works for hire. 17 U.S.C. § 304(a)(1)(B). The parties in this case argue only that *The Urantia Book* may be classified as a cyclopedic work, composite work, or a work for hire. Therefore, the Court need not concern itself with the other exceptions for proprietor renewals.

IV. Analysis

Joint Work

While it is not one of the proprietor exceptions for copyright renewal purposes as discussed above, the work's status as a possible joint work might affect Urantia Foundation's renewal claim. If the Contact Commission were held to be a joint author of the Urantia Papers, the Urantia Foundation might have been able to renew the copyright.[8] Therefore, Michael Foundation and Mr.

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[7] While the term "proprietor" is somewhat ambiguous, it appears that the term "proprietor" is synonymous with an assignee. *Nimmer.* 5.01[B] n. 42.

[8] Whether or not Urantia Foundation, as an assignee, could have renewed the copyright as an assignee from a joint author is a question

(Continued on following page)

McMullan argue that the Urantia Papers cannot be construed as a joint work.

The standard for determining whether a work qualifies as a joint work was articulated by the Second Circuit in *Childress v. Taylor*, 945 F.2d 500 (2nd Cir. 1991). In *Childress*, the court stated that the authors must independently contribute copyrightable expression to the final product rather than merely shape the work through the contribution of ideas. *Id.* at 507; *see also Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1069-71 (7th Cir. 1994). Even those parties that contribute independently copyrightable expression to the work are not considered joint authors when they only participate in subordinate roles. *Childress*, 945 F.2d at 508. The test is whether the parties regarded themselves as joint authors. *Id.*

The undisputed facts in the present case clearly show that *The Urantia Book* is not a joint work. While the Contact Commission may have asked questions which prompted writings by the Conduit, no evidence has been presented to show that the Contact Commission and the Conduit regarded themselves as joint authors of the work. The Contact Commission merely transcribed the Urantia Papers as they were delivered; no changes were made to the content of the Papers. Therefore, the Court holds that the Urantia Papers do not qualify as a joint work.

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that this Court need not address; in this case, the analysis of the nature of the work forecloses the need to make such a determination.

Estoppel

All parties in this case argue estoppel in some form. The Court first examines whether any of Urantia Foundation's arguments are barred by estoppel and then considers whether either Michael Foundation or Mr. McMullan are barred by estoppel.

Michael Foundation argues that Urantia Foundation should be barred from arguing that the Conduit is not the author of the Urantia Papers. To support its claim, Michael Foundation points to the decision by the Western District of Michigan in *Urantia Foundation v. Burton*, 210 U.S.P.Q. 217 (W.D. Mich. 1980). Michael Foundation claims that because Urantia Foundation argued that the Conduit was the author of the Urantia Papers in *Burton*, it should be judicially estopped from arguing a different position before this Court. While the *Burton* court did find that the Conduit was the author of the Papers, there is no indication that Urantia Foundation argued for that result. In fact, Urantia Foundation clearly states that it never took the position that the Conduit was the author of the Papers. UF Reply n. 3.

Even if Urantia Foundation had argued a contradictory position before the *Burton* court, it still would not be estopped in this Court. The Tenth Circuit has explicitly refused to recognize the theory of judicial estoppel. *United States v. 162 Megamania Gambling Devices*, 231 F.3d 713, 726 (10th Cir. 2000). While Michael Foundation may be correct in arguing that the Tenth Circuit's position on judicial estoppel is in the minority, this Court is nevertheless bound by the decisions of the Tenth Circuit. Therefore, the Court finds judicial estoppel inapplicable;

Urantia Foundation may argue that the Conduit was not the author of the Urantia Papers.

Michael Foundation also argues that collateral estoppel/res judicata bars Urantia Foundation from arguing that the Urantia Papers are a work for hire. The Tenth Circuit recognizes both collateral estoppel and res judicata. *Murdock v. Ute Indian Tribe of Uintah and Ouray Reservation*, 975 F.2d 683, 687 (10th Cir. 1992), *Plotner v. AT&T Corp.*, 224 F.3d 1161, 1168 (10th Cir. 2000) Collateral estoppel and res judicata, while often treated together, are distinct concepts. Collateral estoppel bars the re-litigation of the same issue, while res judicata bars the re-litigation of the same cause of action. *Dodge v. Cotter Corp.*, 203 F.3d 1190, 1197 (10th Cir. 2000); *Plotner*, 224 F.3d at 1168. In this case, Michael Foundation argues that Urantia Foundation litigated the issue of whether the Urantia Papers were a work for hire in the *Maaherra* case. This argument presents a question of whether or not a particular issue is barred; therefore, the question is one of collateral estoppel rather than res judicata.

In the Tenth Circuit, collateral estoppel requires:

> 1) the issue previously decided is identical with the one presented in the action in question, 2) the prior action has been finally adjudicated on the merits, 3) the party against whom the doctrine is invoked was a party, or in privity with a party, to the prior adjudication, and 4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

Dodge, 203 F.3d at 1197. While the issue of whether the Urantia Papers were the product of a work for hire was litigated at the district court level, the Ninth Circuit

reversed the decision on other grounds. In addressing the work for hire issue, the Ninth Circuit stated that the district court was probably correct in holding the Papers were not a work for hire. *Maaherra*, 114 F.3d at 961. However, this was mere dicta in the opinion as it was not necessary to the holding in that case. For collateral estoppel purposes, an issue is not considered to be decided unless it was necessary to the disposition of the earlier action. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n. 5 (1979). Because the Ninth Circuit's decision did not rest upon whether the Urantia Papers constituted a work for hire the Court finds that Urantia Foundation is not collaterally estopped from arguing the work for hire issue in this Court.

Urantia Foundation argues that Michael Foundation and Mr. McMullan should be estopped from challenging the validity of the copyright in this case. In making the argument, Urantia Foundation relies upon the theory of licensee estoppel. Urantia Foundation argues that because Mr. McMullan has previously licensed the copyright at issue, he should be estopped from arguing the copyright is invalid. To support its position, Urantia Foundation cites *Creative Gifts, Inc. v. UFO,* 235 F.3d 540, 548 (10th Cir. 2000). However, in *Creative Gifts* the Tenth Circuit only addressed the issue of licensee estoppel in the context of trademark licenses; the Court took no position as to copyrights. Traditionally, because of their mutual goal of procuring works for the public domain, courts have treated copyrights similarly to patents. *Sony Corp. of America v. Universal City Studios, Inc.,* 464 U.S. 417, 437-40 (1984). The concept of licensee estoppel does not apply in the patent context. *Lear, Inc. v. Adkins*, 395 U.S. 653 (1969). The Court finds that because licensee estoppel does not

apply in the patent context, and because copyrights are akin to patents, Mr. McMullan is not barred by licensee estoppel from arguing that Urantia Foundation's copyright in invalid. In any event, Michael Foundation never obtained a license from Urantia Foundation and is not barred from challenging the validity of Urantia Foundation's copyright.

Is Urantia Foundation a "Proprietor?"

Initially, the Court needs to determine whether Urantia Foundation is a proprietor within the meaning of the copyright laws. As stated previously, common law copyright initially vested with the author. Therefore, the common law copyright belonged to the Conduit if he was the author of the works. If the Conduit was not the author of the Papers, no one has a copyright in the contents of the revelations themselves. *Maaherra*, 114 F.3d at 958 (holding the copyright laws were not meant to protect the creative expression of divine beings). The question posed then becomes whether or not the Conduit was the author of the Urantia Papers. While there is a factual dispute regarding this issue, it is irrelevant in determining whether or not Urantia Foundation is the proprietor of the work. All parties to this suit appear to agree that regardless of the authorship of the Papers, the Conduit transferred any and all rights that he possessed to Dr. Sadler. This conclusion is further supported by the court's analysis in *Burton*. In *Burton*, the court noted that Dr. Sadler clearly possessed the Papers and exercised control over them. In addition, the court noted that the Conduit never revealed himself or claimed any interest in the Papers. *Burton*, 210 U.S.P.Q. at 221. Dr. Sadler subsequently transferred all interest in the Urantia Papers to Urantia

Foundation by declaration of trust. Therefore, Urantia Foundation possessed any and all rights initially held by the Conduit in the Urantia Papers. If, on the other hand, the Conduit was not the author of the work, Urantia Foundation still succeeded to all rights held by Dr. Sadler and the Contact Commission in the Urantia Papers. The Urantia Foundation was either 1) assigned all rights held by the Conduit if he was the author of the work, or 2) assigned all rights to the work held by the Contact Commission. Either way, Urantia Foundation qualifies as a proprietor under the terms of the copyright laws. What remains before the court is to determine the nature of the work of which the Urantia Foundation is the proprietor.

From the foregoing discussion of the applicable facts and law in this case, a number of factual scenarios with different outcomes present themselves. For the convenience of the parties, the Court has detailed the possible scenarios in the chart below:

Possible Scenarios

	Conduit is Author	Work For Hire	Urantia Book is a Unified Literary Work	Urantia Book is a Composite or Cyclopedic work	Result
Scenario #1	✓	✓	✓		UF held original copyright (defined as author under 1909 Act); Renewal is valid
Scenario #2	✓	✓		✓	UF held original copyright (defined as author under 1909 Act); Renewal is valid
Scenario #3	✓		✓		UF held original copyright in content of revelations and compilation; No renewal allowed the proprietor exceptions do not apply
Scenario #4	✓			✓	UF held original copyright in content of revelations and compilation; Renewal on both nullified and compilation is allowed
Scenario #5			✓		UF may hold valid copyright on table of contents only; Text of Urantia Papers in Public domain
Scenario #6				✓	UF held original copyright in the compilation. Can rerew compilation only – content of revelations in public domain (*Maaherra* holding)

Analysis of Scenario

Nature of the Work

As shown in the chart above, in order to show Urantia Foundation's copyright is invalid, Michael Foundation and Mr. McMullan must prove 1) the Conduit was the author of the work[9], 2) the work is a unified whole rather than a composite or cyclopedic work, and 3) the work was not a work for hire. Unless Michael Foundation and Mr. McMullan can prevail on each of these issues, Urantia Foundation's copyright on *The Urantia Book* is valid.

Determining the nature of a particular work is a mixed question of law and fact. *Xoom v. Imageline, Inc.*, 1999 WL 1611444, *1 (E.D. Va. 1999). Therefore the Court will attempt to cross-apply the pertinent facts to the appropriate legal arguments as the analysis goes forward.

Unified Literary Work

Michael Foundation argues that the Urantia Papers are simply a unified literary work – much like a book or article. If this is the case, regardless of its proprietor status Urantia Foundation would not currently be entitled to a valid copyright. As stated previously, proprietors can only renew copyrights in limited situations. Proprietors cannot renew copyrights on unified literary works. In the absence of the Conduit's heirs having renewed the work,

[9] The nature of the work is dealt with in separate sections below. Rather than discussing the question of authorship separately, the Court addresses the issue where appropriate in the analysis.

the Urantia Papers would fall into the public domain when the initial copyright term expired.

The Urantia Papers cannot be considered a unified literary work if the Conduit merely channeled the divine beings. If a human was not the author, the divine beings are not entitled to copyright protection on the work. *Maaherra*, 114 F.3d at 958. Therefore, human authorship of the Papers is a necessary, but not sufficient condition to a determination that the Urantia Papers are a unified work. The Court finds the question of whether or not the Conduit authored the Papers to be one of fact. The Urantia Foundation argues that there was no "creative spark" on the part of the Conduit and that he was merely channeling the divine beings. Michael Foundation argues that while the Conduit was divinely inspired, there was enough of a creative spark to qualify the Urantia Papers for copyright protection. In light of the standard governing summary judgment motions, the Court finds there to be a disputed issue of material fact with respect to the authorship of the Urantia Papers.

Even if the Conduit is found to be the author of the Papers, Urantia Foundation argues that summary judgment is nevertheless appropriate. Urantia Foundation argues that an examination of the work itself reveals that the work cannot be construed to be unified. The Court therefore must examine the arguments regarding the unified nature of the work presented by all parties. Michael Foundation argues the Papers are meant to be read together and that the fact that the Papers were written in piecemeal fashion does not transform the work into a compilation. Michael Foundation further argues that 1) the Papers have never been presented by Urantia Foundation to be an anthology of any sort, 2) the Contact

Commission did not re-arrange the Papers into an order of its own choosing, and 3) the Papers are consistent in that concepts presented in earlier Papers are referred to in later Papers.

Urantia Foundation presents a number of arguments to support its position that the Urantia Papers are not a single, unified work. First, Urantia Foundation argues that the Papers were expanded upon review by the Contact Commission. Next, Urantia Foundation argues that the Papers did not come in completely sequential order. Finally, Urantia Foundation argues that multiple authors made contributions to the work. Upon review of the record, the Court finds there is a fact question surrounding the scope of the expansion and revision of the Papers performed by the Contact Commission.

The Court further finds Urantia Foundation's argument that the contribution of multiple authors destroys the unified nature of the work to be without merit. As previously stated, minimal additions do not transform the work from a unified work into a composite work. *Nimmer*, 3.02. The facts before the Court show that the table of contents added by Dr. Sadler make up a mere sixty pages. When viewed in light of the two thousand ninety seven pages contained in *The Urantia Book*, the sixty page table of contents may be considered a minimal addition to the work. The Court finds the addition of the table of contents[10] does not transform the fundamental nature of the

[10] While it appears the added table of contents may be capable of sustaining a copyright in its own right, the Court need not resolve the issue of whether Urantia Foundation holds a copyright in the contents of the table of contents.

work. Therefore, for the purposes of the remaining discussion, the Court considers *The Urantia Book* (including the Urantia Papers and Dr. Sadler's table of contents) to be the same as the Urantia Papers.

Composite Work

Urantia Foundation argues *The Urantia Book* should be considered a composite work. As stated previously, a composite work is a subset of a compilation where each of the contributions is independently copyrightable. *Nimmer*, 3.02. In this case, two types of composite works may exist. If the Conduit is determined to be the author of the Urantia Papers, and the work is considered to be a composite work, then as proprietor of a composite work Urantia Foundation's renewal copyright covers not only the arrangement of the Papers, but the content of the Papers as well. If, however, the Conduit is not the author of the Papers, and the work is deemed to be a composite work, Urantia Foundation holds a renewal copyright only in the compilation of the revelations. This second scenario mirrors the Ninth Circuit's holding in *Maaherra*, 114 F.3d 955. The Urantia Foundation would hold a compilation copyright, but the individual revelations could be freely copied. *Id.* at 959.

Unfortunately, the record regarding the origins of the Urantia Papers is not yet complete enough for this Court to determine whether *The Urantia Book* is a composite work. If *The Urantia Book* were found to be a composite work, Urantia Foundation, as a proprietor, work [sic] be entitled to renew the copyright under the proprietor exceptions. 17 U.S.C. § 304(a)(1)(B). However, factual

questions remain as to how precisely the Papers were written. The parties state that the Papers were produced in response to questions posed by the Contact Commission; however, no detailed evidence has been presented regarding the nature of the process. Did the questions, and therefore the Papers, build on previous questions and Papers? Were the Papers meant to be cumulative? These missing historical facts bear directly on the nature of the work. In addition, if the Conduit is deemed to be the author of the work, the record is devoid of evidence as to whether the Conduit intended the Urantia Papers to be separate, discrete works. If, on the other hand, the Conduit is not the author and the revelations may be copied freely, no evidence has been presented as to what constitutes a "revelation." Whether a revelation is 1) a section as delivered by the Conduit, 2) a single paper, 3) a numbered unit, or 4) a single sentence is a question yet to be determined. If a revelation is a section as delivered, Part IV of the book may be able to be freely copied; this would have a direct bearing on the scope of any copyright held by Urantia Foundation. Because the record is not sufficient to determine whether or not *The Urantia Book* is a composite work, the Court cannot grant summary judgment on this issue at this time.

Cyclopedic Work

A cyclopedic work is a subset of collective work. 17 U.S.C. § 101. Cyclopedic works refer to works similar to an encyclopedia in nature. If *The Urantia Book* is found to be a cyclopedic work, Urantia Foundation, as proprietor of the work, would be entitled to renew the copyright under the exception for proprietor renewals. 17 U.S.C. § 304(a)(1)(B). The Urantia Foundation argues that Mr.

McMullan admits that *The Urantia Book* is a cyclopedic work. In support of its argument, Urantia Foundation cites Mr. McMullan's deposition in which he states: "*The Urantia Book* is a unique depository of information of a multitude of subjects from the structure of atoms to the structure of the universe." McMullan Depo., p.24. In their surreply brief, Michael Foundation and Mr. McMullan strongly deny any admission that the work is a cyclopedic work. Upon review of the entire record, the Court finds that Michael Foundation and Mr. McMullan do not admit *The Urantia Book* is a cyclopedic work within the meaning of 17 U.S.C. § 304(a). In the absence of an agreement between the parties regarding the possible cyclopedic nature of the work, the Court finds the record insufficient to determine this issue as well. Specifically, the authorship of the work remains in dispute and the intended purpose of the work is unclear. As stated above, facts critical to determining the nature of the work are missing.

Work for Hire

As noted above, Urantia Foundation is not precluded from arguing that *The Urantia Book* is a work for hire. A work for hire allows an employer to claim a copyright in the works developed by his/her employees. 17 U.S.C. § 101. In order for a work to be considered a work for hire, a supervisory relationship is necessary. The general rule that developed in the courts under the 1909 Copyright Act was "to accord copyright protection to employers for works made by their employees in the regular course of business." *Nimmer*, 5.03[B][1][a]. However, courts have also found that volunteer work subject to supervision can constitute a work for hire under the 1909 Copyright Act. *Clarkstown v. Reeder*, 566 F.Supp. 137, 141-142 (S.D.N.Y.

1983). Neither party argues that an employment relationship was involved in the formation of the Urantia Papers. Nevertheless, Urantia Foundation mentions in a footnote that the work may be considered a work for hire. Urantia Foundation Brief at 14 n.5. Michael Foundation disagrees and argues that no evidence showing an employment relationship has been presented. While the Court agrees that no evidence has been presented to show a traditional employment relationship, there is evidence in the record to support a finding that the Conduit may have been subject to some sort of supervision. Once again, the record is insufficient to make a concrete determination on this issue. Fact questions surrounding the origin of the Urantia Papers remain which preclude a finding that *The Urantia Book* was a work for hire.

V. Basics of Trademark Law

As stated above, Urantia Foundation seeks this Court to adjudge four trademarks held on the mark Urantia® and one trademark held on the mark Urantian® to be valid. Michael Foundation and Mr. McMullan challenge the validity of these marks on two grounds. First, Michael Foundation and Mr. McMullen assert that the marks are generic because they are recognized by the public as a generic name for a religion. Second, they assert the marks are invalid due to an alleged fraud that occurred during the registration process.[11] As with copyright law, the Court

[11] Urantia Foundation attempts to anticipate a possible attack on its marks by arguing that the marks are not geographical terms incapable of protection. UF Brief at 25. In support of its contention, Urantia Foundation cites *World Carpets, Inc. v. Dick Littrell's New*

(Continued on following page)

believes a brief overview of the applicable principles of trademark law will help to put the arguments of the parties into context and provide a framework for analyzing the validity of the marks in question.

Trademark Framework

Trademarks allow users to identify goods and services and distinguish them from others. J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, § 3:1 [hereinafter *McCarthy*]. Trademark law is distinct from other areas of intellectual property such as copyright and patent law. *Id.* at § 6:3. What may function as a trademark varies widely, but generally, words, symbols, and phrases may all enjoy trademark protection. *Id.* at § 3:1.

Trademarks are of three main types: 1) marks that are inherently distinctive, 2) marks that may become distinctive, and 3) marks that are no longer distinctive. *Id.* at 11:4. Inherently distinctive marks are protectable and registrable immediately upon use. *Id.* These marks are generally fanciful, arbitrary, or suggestive in nature. Examples of inherently distinctive marks include "Kodak" as a fanciful mark for photo equipment and "Coppertone" as a suggestive mark for suntan lotion.

World Carpets, 438 F.2d 482, 486-87 (5th Cir. 1971) for the proposition that names of planets are not geographic terms within the meaning of the Lanham Act. Neither Michael Foundation nor Mr. McMullen contest this argument in their briefs. Therefore, the Court finds that the marks Urantia® and Urantian® are not invalid as a result of being descriptive geographic terms without secondary meaning.

Marks that may become distinctive include both descriptive marks and geographic terms. Descriptive marks do not automatically receive protection, nor may they be immediately registrable. Descriptive marks are marks which are descriptive of the purpose, function, or use of the goods. *Id.* at § 11:16. For example, "World Book" encyclopedia is descriptive of the encyclopedia contents. These descriptive marks may not be protected unless "secondary meaning" can be shown. A mark acquires secondary meaning when consumers recognize and accept that the descriptive mark identifies a single seller or source. *Id.* at § 11:25. Determination of secondary meaning is a question of fact and all probative evidence that shows probable customer reaction should be considered. *Id.* The Lanham Act provides a second method of establishing secondary meaning. If a trademark has been in continuous use in the United States for five years, secondary meaning is presumed. 15 U.S.C. § 1052(f). In the above example, "World Book" has been shown to have acquired secondary meaning. *Field Enterprises Educational Corp. v. Cove Industries, Inc.*, 297 F.Supp. 989 (E.D.N.Y. 1969). Geographic terms are marks that may either be arbitrary or descriptive. *McCarthy*, §14:1. Their treatment depends on their use. If the geographic term is used in an arbitrary fashion (i.e. "Salem" cigarettes), the term is entitled to immediate protection. *In re Nantucket, Inc.*, 677 F.2d 95, 100 (C.C.P.A. 1982). However, if the term is used to denote a specific geographic region (i.e. "Denver" for a magazine focusing on Denver, Colorado), they are considered to be descriptive. When used in a descriptive fashion, geographic terms must acquire secondary meaning before they are allowed protection under the trademarks laws. *Id*; 15 U.S.C. § 1052(e)(2).

The third category of trademarks includes marks that have lost their distinctive characteristics. A trademark may become "generic" when the relevant public associates the name with a type of product rather than identifying a product from a specific source. A good example of a mark that has become generic is "Thermos." *King-Seeley Thermos Co. v. Aladdin Industries, Inc.*, 321 F.2d 577 (2nd Cir. 1963). The evidence presented in that case showed the relevant public associated the name "Thermos" with vacuum sealed bottles generally; the mark no longer identified a particular manufacturer. *Id.* at 581. Because terms that are generic can never have trademark protection, a mark that becomes generic loses its trademark protection. *McCarthy*, § 12:1, 15 U.S.C. § 1064. Because the relevant public's perception of a mark is a question of fact, a court may accept evidence of public understanding of the term from "any competent source, such as customer surveys, dictionaries, newspapers, and other publications." *Dan Robbins & Associates, Inc. v. Questor Corp.*, 599 F.2d 1009, 1014 (C.C.P.A. 1979).

Much like copyright law, trademark law has a dual system of protection – state and federal. States offer varying amounts of trademark protection; however, state trademark law is not at issue in this case so the Court will focus exclusively on federal trademark protection. The federal trademark act (Lanham Act), codified at 15 U.S.C. § 1501 et. seq., offers a number of benefits to registrants. First, federal trademark registration acts as constructive notice to others of the owner's interest in the mark. 15 U.S.C. § 1072. In addition, federal registration allows for a mark to become "incontestable" five years after a mark has been registered. 15 U.S.C. § 1065. This incontestability is conclusive evidence of the registrant's exclusive right to

use that mark on the type of goods in question, subject to only certain defenses. 15 U.S.C. § 1115(b).

Analysis

In order to analyze the validity of the trademarks in question, the Court must first determine the nature of the marks. As a first step, the Court notes that the marks are incontestable. However, as a practical matter, the marks' status as incontestable has limited bearing on the issues in this case. Michael Foundation and Mr. McMullan attack the trademarks on the grounds that 1) the marks are generic, and 2) the marks were registered through fraud. Incontestable marks are open to both of these attacks. *See* 15 U.S.C. § 1115(b) (declaring incontestability to be subject to a defense of fraud); *Id.* § 1065(4) (no incontestable right shall be held in a generic mark). Therefore, the incontestable status of the marks has no relevance to the case at hand.

It is important to recognize, however, that Urantia Foundation's marks are federally registered. Federal registration gives rise to a strong presumption of validity. *The Coca-Cola Co. v. Overland, Inc.*, 692 F.2d 1250, 1254 (9th Cir. 1982). This general presumption of validity "includes the specific presumption that the trademark is not generic." *Id.* The presumption of validity shifts the burden to Michael Foundation and Mr. McMullan to show that the marks are generic or were procured through fraud. *McCarthy*, §§12:12; 31:68. In order to carry their burden, Michael Foundation and Mr. McMullan must prove by a preponderance of the evidence that the marks are generic, or in the alternative, must show by clear and convincing evidence that the marks were obtained as a

result of fraud on the Patent and Trademark Office. *Stocker v. General Conference Corp. of Seventh-day Adventists*, 39 U.S.P.Q.2d 1385, 1392 (Trademark Tr. & App. Bd. 1996), *Money Store v. Harriscorp Finance, Inc.*, 689 F.2d 666, 670 (7th Cir. 1982).

Genericism

Michael Foundation and Mr. McMullan seek to invalidate Urantia Foundation's trademarks in the terms Urantia® and Urantian® by arguing that they have become a generic name for a religion. As an initial matter, the Court notes that religious organizations can generally own trademarks and obtain trademark protection. *McCarthy*, § 9:7; e.g. *National Bd. of YWCA v. YWCA of Charleston*, 335 F.Supp. 615, 625 (D.S.C. 1971). In addition, as stated above, Urantia Foundation's marks are registered and enjoy a strong presumption of non-genericness. *Coca-Cola*, 692 F.2d at 1253. Michael Foundation and Mr. McMullan must show by a preponderance of the evidence that the marks are generic. *Stocker*, 39 U.S.P.Q.2d at 1392.

In order to determine if the marks are generic, the Court must first determine the scope of the relevant public and then ascertain its perception regarding the marks. Urantia Foundation argues the relevant public should include all potential purchasers of *The Urantia Book*. In support of its position, Urantia Foundation cites *Creative Gifts, Inc. v. UFO*, 235 F.3d 540, 544 (10th Cir. 2000) and *Urantia Foundation v. Maaherra*, 895 F.Supp. 1338, 1343 (D. Ariz. 1995). Michael Foundation and Mr. McMullan disagree and argue that, in the religious context, the relevant public should be defined as followers of *The*

Urantia Book. *Stocker*, 39 U.S.P.Q.2d at 1394; *Self-Realization Fellowship v. Ananda Church of Self-Realization*, 59 F.3d 902, 909 (9th Cir. 1995). The Court will analyze the issue of genericism under both definitions of the relevant market.

In analyzing what the relevant public thinks about the Urantia® and Urantian® marks, the Court must determine what the marks' primary significance is to the relevant market. *Stocker*, 39 U.S.P.Q.2d at 1391; *Magic Wand, Inc. v. RDB, Inc.*, 940 F.2d 638, 640 (Fed. Cir. 1991). As evidence, the Court may accept any competent source that shows what the relevant market thinks. *Qeustor Corp.*, 599 F.2d at 1014. In this case, Michael Foundation and Mr. McMullan must show that the relevant public does not identify the goods and services bearing the Urantia® and Urantian® marks with Urantia Foundation, but rather think the marks refer to a religion generically. It is important to note that "Urantia" could be the name of a religion generally and still not be considered generic, the key is whether the relevant public recognizes the marks on goods and services to identify Urantia Foundation as the source. Other religious names have been held to be valid trademarks as long as the identification function was still served. *See General Conference Corporation of Seventh-Day Adventists v. Perez*, 97 F.Supp.2d 1154, 1162 (S.D. Fl. 2000); *Christian Science Bd. of Directors of the First Church of Christ, Scientist v. Robinson*, 115 F.Supp.2d 607, 610 (W.D.N.C. 2000). However, when used in a manner that does not identify the source of goods or services, the name of a religion maybe held to be generic. *Christian Science Bd. of Directors of the First Church of Christ, Scientist v. Evans*, 520 A.2d 1347 (N.J. 1987).

Assuming Urantia Foundation is correct in asserting the relevant public encompasses all potential purchasers of *The Urantia Book*, Michael Foundation and Mr. McMullan must prove that the general public does not associate either the Urantia® or the Urantian® marks with Urantia Foundation. Neither Michael Foundation nor Mr. McMullan have provided the Court with any evidence that the general public does not associate the marks with Urantia Foundation. In light of the presumption of validity that applies to the marks the Court finds that Michael Foundation and Mr. McMullan have not shown by a preponderance of the evidence that the marks Urantia® and Urantian® are generic with regard to the general public.

If the Court assumes rather that the relevant public consists only of the followers of *The Urantia Book*, Michael Foundation and Mr. McMullan must still prove that the followers do not associate materials bearing the Urantia® and Urantian® marks with Urantia Foundation. Some evidence is presented to show that followers of *The Urantia Book* consider "Urantia" to refer to a religion. MF Facts ¶ 20. Whether or not the followers of *The Urantia Book* consider "Urantia" to be a religion is a disputed issue of material fact. The Urantia Foundation has presented the Court with evidence showing that less than 5% of the followers believe "Urantia" to be a religion. UF Reply at 10. However, even if the Court gave Michael Foundation and Mr. McMullan the benefit of the doubt and assumed "Urantia" to be a religion, there is still a total lack of evidence showing that the followers of the Urantia religion fail to identify goods and services bearing the Urantia® and Urantian® marks with Urantia Foundation. Therefore, regardless of the definition of the relevant market that is used, the Court finds that Michael Foundation and

Mr. McMullan have not met their burden of showing by a preponderance of the evidence that the marks Urantia® and Urantian® are generic.

Fraud

Michael Foundation and Mr. McMullan next seek to invalidate Urantia Foundation's trademarks in the terms Urantia® and Urantian® by arguing that they were obtained through fraud. In alleging fraud, Michael Foundation and Mr. McMullan bear a "heavy burden of proof." *W.D. Byron & Sons, Inc., v. Stein Bros. Mfg. Co.*, 377 F.2d 1001 (C.C.P.A. 1967). In order to invalidate Urantia Foundation's marks, Michael Foundation and Mr. McMullan must prove fraud by clear and convincing evidence *Beer Nuts, Inc., v. Clover Club Foods Co.*, 711 F.2d 934, 942 (10th Cir. 1983). In order to prove fraud, those challenging the marks must meet the five part test as articulated by the Tenth Circuit in *San Juan Products, Inc. v. San Juan Pools of Kansas, Inc.*, 849 F.2d 468 (10th Cir. 1988). Michael Foundation and Mr. McMullan must plead and prove 1) the false representation of a material fact, 2) the registrant's knowledge or belief that the representation is false (scienter), 3) the intention to induce action or refrain from action in reliance on the misrepresentation, 4) reasonable reliance on the misrepresentation, and 5) damages proximately resulting from such reliance. *Id.* at 473.

Michael Foundation and Mr. McMullan assert that all aspects of the test are met. They argue that Urantia Foundation misrepresented the religious nature of the

organization to the Patent and Trademark Office. Specifically, evidence is presented to show that certain registrations were initially rejected because of religious content. In order to overcome the rejections, Urantia Foundation 1) modified its application to characterize Urantia Foundation as an educational trust and 2) characterized the term "Urantian" as a "coined term." Michael Foundation and Mr. McMullan argue that because Urantia Foundation knew that "Urantia" referred to a religion and that it knew the term "Urantian" actually came from *The Urantia Book*, representing Urantia Foundation as an educational institution and "Urantian" as a "coined term" constituted fraud.

However, the Court finds the scienter requirement to be lacking. Both Michael Foundation and Mr. McMullan rest their argument on the presumption that not only does "Urantia" refer to a religion, but that Urantia Foundation knew it at the time. As discussed above, there is a material issue of disputed fact regarding whether or not "Urantia" refers to a religion. Urantia Foundation could very well have believed at the time, as it does today, that "Urantia" does not refer to a religion. In addition, no evidence has been presented to show that the attorney prosecuting the trademark application for the mark Urantian® knew the word "Urantian" came from *The Urantian Book*. In light of the dispute regarding the religious nature of the term "Urantia," and the lack of evidence concerning "coined term" issue, the Court finds that Michael Foundation and Mr. McMullan have failed to show by clear and convincing evidence that the marks Urantia® and Urantian® were registered through fraud.

Because the Court does not find the marks Urantia® and Urantian® to be either generic or registered through

fraud, the Court finds the marks to be valid and enforceable.

VI. Conclusion

For the reasons stated more fully above Urantia Foundation's Motion for Partial Summary Judgment is granted in part and denied in part. The court GRANTS the motion to the extent that it finds the five trademarks held by Urantia Foundation to be valid and enforceable. The Court DENIES the motion to be extent that the Court, because of disputed issues of material fact, cannot at this time hold the copyright held by the Urantia Foundation to be valid and enforceable.

ENTERED this 8th day of June, 2001.

/s/ Lee R. West
LEE R. WEST
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MICHAEL FOUNDATION, INC., a foreign corporation, Plaintiff-Appellee, v. URANTIA FOUNDATION, an Illinois Charitable Trust, Defendant-Third-Party Plaintiff-Appellant, v. HARRY MCMULLAN, III, Third-Party Defendant-Appellee.	Nos. 01-6347 and 01-6348

ORDER

Filed April 11, 2003

Before TACHA, ALDISERT*, and McWilliams, Circuit Judges.

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* The Honorable Ruggero J. Aldisert of the United States Court of Appeals for the Third Circuit, sitting by designation.

Appellant's petition for rehearing is denied by the panel that rendered the decision. Judge McWilliams voted to grant rehearing.

Entered for the Court
PATRICK FISHER,
Clerk of Court

by: /s/ Opal A. Carter
Deputy Clerk

App. 79

Nos. 01-6347 and 01-6348

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MICHAEL FOUNDATION, INC.,
Plaintiff-Counterclaim Defendant-Appellee,

v.

URANTIA FOUNDATION
Defendant-Third-Party and
Counterclaim Plaintiff-Appellant,

v.

HARRY MCMULLAN III,
Third-Party Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of Oklahoma

The Honorable Lee R. West, Senior District Judge

District Court No. 00-885-W

APPELLANT'S APPENDIX

VOLUME 14 OF 14, pages 3416 to 3742

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[971] not to the admissibility.

Thank you, Your Honor.

THE COURT: Now then, gentlemen, I've resustained the objection.

We have an additional matter I think I allowed somebody to reserve the right to make a – at the close of all the evidence – or at the close of the plaintiff's evidence I think counselor reserved the right to make a record at the end of the case. Am I correct about that, counselor?

MR. ABOWITZ: Yes.

THE COURT: All right. Who wants to do so?

MR. HILL: I think –

MR. PLOURDE: I wonder if we could take just a brief recess, Your Honor. I'll be much more comfortable making that if I can just go to the rest room.

THE COURT: All right. We'll take five minutes then and come back. Court's in recess.

(A RECESS WAS HAD, AFTER WHICH THE FOLLOWING PROCEEDINGS WERE HAD IN OPEN COURT, OUT OF THE PRESENCE AND HEARING OF THE JURY:)

THE COURT: Be seated.

Who's going first?

MR. PLOURDE: Your Honor, at this point Michael Foundation and McMullan move for a directed verdict with respect to the validity of the copyright.

[972] THE COURT: I think technically it's now a motion as a matter of law but – or for judgment as a matter of law. I understand the directed verdict.

MR. PLOURDE: You're right, Judge. I'm sure Mr. Hill can cite the rule to you too.

Judge, as I understand the decision tree here, it's gotten a lot more simple from the time that we started. The issue here is the copyright and we don't have to worry about the first branch of the decision tree, whether or not it's human authors – the patient is the author or celestial beings are the author of the book. We're dealing with a human author. And the two ways that they claim their copyright is valid, is, one, that it's a composite work and, two, that it's a commissioned work. And we submit that either way they can't win.

The first issue on composite work. Your Honor, we believe that we've adequately briefed the issue of whether one person can be a composite work – excuse me – one person can create a composite work under the 1909 act. We've submitted case after case after case that says they can't, authority after authority that says they can't, and we think it's clear that one person dong his own writings can't create a composite work.

There is not only a number of cases that we've cited but I think the rationale is valid. The rationale primarily behind the composite work definition or composite work provision under [973] the 1909 act was that if you have – and I think Mr. Hill has said this – if you have a half dozen authors that have contributed works to a periodical or encyclopedia or whatever, in order to renew that, you'd have to go out and get all those people to sign up and renew the copyright. When it's only one author, you don't

have that problem, and there's no reason not to require that one author to come in.

I think, as I said, the case law makes it fairly clear that under the 1909 act a composite work doesn't rise to where the contributions are submitted by one author and there's no evidence that it's anything else here.

Even if one author could by themselves create a composite work, this isn't it. Their testimony, their own admissions by witness after witness after witness is that this is a unified work. That you can't separate it out. It would be like cutting up the Mona Lisa, I think is what one of their trustees said, or taking a single piece of a puzzle out of the puzzle. And I think that really says it all. So, even if one person can create a composite work, their own admissions establish that this isn't it.

With respect to the commissioned work, Your Honor, I think the evidence is fairly clear, and I've seen your current draft of an instruction on a commissioned work. Just kind of going down through the tests that you enumerated, Judge, I think who has control of the means of production here, I think it's [974] fairly clear from the evidence, and even their own evidence, that it wasn't The Contact Commission. Whether the work was created at the commissioning party's insistence and expense.

What we have is testimony that the revelators initiated this process. The Contact Commission didn't go to the patient. The Contact Commission didn't go to the revelators. The revelators, according to them, initiated this process. The revelators called for questions and asked them, "Give us some questions, we'll give you answers." The revelators decided when the work was done. The revelators decided when the work would be published.

That's been the testimony here. And what it really comes down to is that all of that was coming through the patient. There wasn't any communication with the revelators other than through the patient. And I don't think that it's appropriate to say that The Contact Commission controlled the process when the only thing that they were doing was, according to their own evidence, reacting to instructions that they got through the patient and they believed from the revelators.

Whether the commissioning party possessed or exercised the right to direct the manner in which the work was done, though actual exercise of that right is not controlling. Again, you know, I think their testimony has been consistently that the revelators did that and, again, it was through the patient and it wasn't them.

[975] Whether the commissioning party supplied capital for the production of the work. I think Judge, this is an area that needs work on this particular instruction because it's not clear what Your Honor would be referring to as far as capital for the production of the work, but it's clear that the author of this was the patient and they didn't provide any capital to the patient. There's no testimony that they provided any capital to enable the patient to bring about the writing of this work. I think all their evidence goes to is what happened after they got possession of the transcript and the fact that they paid to publish it later on, and I don't think that's sufficient.

And whether the preparer was hired as an employee to do the work. Well, it was the other way around. This started off, at least, as a doctor/patient relationship and the patient hired the doctor to help him. There's no

evidence to establish that the patient was hired to bring about this work.

So, we think it's clear under the evidence that it's not a commissioned work. It can't be a composite work because we only have one author, and even if we had more than one author, their own admissions are that it's a unified work. If its not a composite work, it's not a commissioned work, then it's a unified work by the patient. Even if the patient assigned his interest in that common-law copyright and they properly registered the initial copyright, the patient, under Section [976] 304 of the Copyright Act, or his heirs or assigns – excuse me – statutory heirs or next-of-kin, there's a couple of exceptions, would have to come forward. The only evidence is that the copyright was renewed by Urantia Foundation and they've offered nothing to show that Urantia Foundation is one of those statutory parties that are entitled to renew.

Based on that, Judge, we'd ask you to enter judgment as a matter of law.

THE COURT: I'll call on counsel to respond. I think we'll keep them separate, let you respond, and then move, if you wish to do so, for your own judgment.

MR. HILL: Okay, as long as the second motion can be brief and just incorporate most of what I'm about to do, Judge.

I'll take them in his order. The composite work. I'd like to cite the Nimmer treatise for the proposition that a collective work and a composite work are one in the same for purposes of Section 304 of the 1976 act which is the governing renewal provision in this case, Judge. We also found a case in the District of Oregon called DeLendon v.

Brinn (sp), 1982 Westlaw 1162, I believe is that cite, that uses these terms, composite work and collective work, interchangeably. Of course, a collective work includes the collected writings of a single person or author.

As to the unified nature of the work, I think there's certainly a fact issue for the jury to decide on that at a [977] minimum. For starters, the papers are papers and they're not chapters. The evidence suggested showed that there are entire conferences and study sessions devoted to single papers. Seminars are taught on single papers. That is not true, I submit, of a single chapter from John Grisham's latest novel.

There was some evidence of both – of the parts, papers and stories within The Urantia Book standing alone. Now, it may very well be that there is a larger broader context to be understood if you accept the proposition that the book is what it purports to be, which is a divine revelation, but at the same time asking people who have that belief whether or not the book is a unified work and having them say "yes" and asking them questions about inviolate text, which is a requirement of the Declaration of Trust, really doesn't advance the ball in terms of showing the intrinsic nature of the work itself.

We look, for example, just as why we're here, which is that Mr. McMullan has broken off a part of The Urantia Book and printed it as a separate work because, as he testified, it can stand alone. Urantia Foundation exhibit 36, Mr. McMullan's description of Jesus – A New Revelation, it is a complete biography of Jesus. He testified that it works well without the entire book.

We would also point to the testimony that they introduced regarding the fact that under their view of the case

the Jesus papers had a separate origin that came after all of the other [978] papers, almost in the nature of a sequel. To that extent, we would also submit that there's more evidence in the record regarding whether or not this book and its component parts may be viewed by the jury as a collective work.

We would also point out that there was evidence in the case regarding compilation of information from human sources in connection with each of these papers. Remember, this is a unique process. Each of these papers are created independent. The papers are studied by The Forum independently. A paper would be looked at, more questions would be asked, and those questions would serve as further building blocks for additional content within that paper.

It's relatively clear from the Helen Carlson testimony by deposition that she took a paper, she asked a question, and a week later she saw a new form of that paper and it incorporated the answer to the question that she had asked.

The human – There are human source materials such as the Bible and the Weyman work that we heard some evidence from that further suggest that this is – this can be viewed as a reference work from a standpoint that it does gather the, you know, materials from 2,000 different sources. Ms. Newsom testified that she in college used the book as a reference book. And I would submit that those are indications that the book may meet the legal definition of an encyclopedic work.

The book has a composite presentation and feel. On page [979] 1005 of the book it describes itself as a composite presentation. There are, of course, 58 claimed authors

in the titles of the papers. And, frankly, the coverage of the book is extensive. I think we heard testimony from many of the witnesses in this case regarding all of the different subject matter that is covered in The Urantia Book. And, again, that goes to the special class of composite works that are cyclopedic works.

Finally, Your Honor, with respect to selection and arrangement by the compiling entity, these papers are being received as a part of a fluid process. Each paper, starting with the early versions, the first paper and then the second 57 papers that came, they were received one by one by The Contact Commission, the evidence shows. They were always maintained in the custody of The Contact Commission. The Contact Commission had control over the manner in which they ultimately were compiled and published as a single unit. It may very well be that The Contact Commission believed that they were acting from divine instructions or celestial instructions in the course of doing that; however, I would submit that the law would not take regard of the source of the inspiration per the Garman v. Sterling decision that I provided the Court earlier today.

The Bowman diaries and the testimony of Carolyn Kendall on this matter is instructive. The material was not – as it exists in The Urantia Book is not in the same order in which it [980] was presented and studied during the formative years of The Urantia Book.

In addition, we'd point out that as of 1937, according to the Bowman diaries, there were 126 pagers and they totaled over 3,000 typed pages. Using some basic math, you would conclude from that that there were to be 5,000 typed pages when there were 196 papers; however, even

accounting for some reformatting, I think there's still an inference that some material was reduced or taken out before the book was published.

The Richard Keeler testimony was that there were numerous amounts of material that was taken down by Ms. Christensen in these sessions other than the early versions of the papers, those first 57 papers that were taken down originally in stenography and served as the foundation basis for more questions until finally complete 196 papers appeared and appeared in the handwriting of the patient. There were numerous sessions that continued all the way up until the book was published, and the contents of those sessions may or may not have been included in what was ultimately published. And the persons making that decision, of course, were The Contact Commission. And that material did not make it into the book.

Finally, we would point to the fact that the questions on each paper contributed in a material way to the internal content and arrangement of each of the papers. And that [981] summarizes our position on the composite work issue, Judge.

Collective work. I'll hopefully be a little more to the point. The insistence and expense test, there is evidence to meet both of those prongs. Insistence is proven in at least two ways based on the evidence. There is at least an inference that The Contact Commission began asking questions and that is how this process began. It may very well be that they were challenged by revelators or anyone else to ask more challenging questions but the evidence shows that there were questions that preceded this, that there were questions that drove this process from start to

finish over a number of years. There is also the persistence. The Mind of Mischief identifies 250 contact sessions during the first 18 years, and, of course, that book was published in 1929 and the evidence supports the inference that these contact sessions continued until at least 1942 when the final genetic questions were asked by the Contact Commission to the subject.

So, we believe that based upon that, there is a strong inference of insistence and we'd point to Yardley v. Houghton Mifflin as just an example where solicitation of a work does meet the insistence prong.

As far as expense of the work, in Murray v. Gelderman, a corporation approached a writer, a freelance cook, professional cook or chef, and asked her to compile or to create a bunch of menus of New Orleans style cuisine. They gave her complete [982] artistic freedom in the course of doing that and agreed that she would retain editorial control. However, the corporation paid for the expenses of publishing the book when she brought it back to them and the court found that that was the significant factor in deciding that the book was, in fact, a commissioned work, notwithstanding the fact that the chef retained at all time artistic control and freedom over the contents of what she handed back to the corporation.

We'd point to Michael Foundation exhibit 8, our exhibit 16 and 82, for the proposition that The Contact Commission bore the expense associated with this particular project.

On the right to direct or supervise, there's an interesting quote, Judge, in Yardley v. Houghton Mifflin where they talk about the copyright vesting in the commissioned party who has no intention of overseeing the detailed

activity of any employee hired for the very purpose of producing the material. Now, of course, we're talking about a voluntary effort here. But, nevertheless, that particular prong in the Reeder case, in Town of Clarkstown v. Reeder, was met because the town had meetings with the person who was writing this youth court manual and the town also had meetings with other officials where they gathered ideas that they then took back to this person and submitted to him. The court in Reeder said that that was – that under those circumstances the power to control and supervise was implicit.

[983] We also point out that based upon the evidence that I've already refereed to regarding selection and arrangement, The Contact Commission was always in control of these manuscripts and ultimately controlled whether or not to publish them.

The next factor is the supplying of the capital to finance the publication of the work. And, indeed, pointing again to the Murray decision, we would indicate that there is evidence in the record that we meet that prong.

Lastly, just a note on compensation to the subject or absence thereof. Professor Nimmer writes in his treaties, "One may be an employee if the writing is done as an accommodation with no compensation at all." Mr. Keeler and Mr. Kendall – Ms. Kendall both relayed that the subject was aware of the project, was shown the papers, and did not object. And there is a strong inference from the length of this process and the numerous sessions in which the subject participated that this was totally voluntary and the subject knew that The Contact Commission was holding the copyright as the commissioning party in that relationship.

THE COURT: All right. The plaintiff's motion for judgment as a matter of law will be denied.

Now you may present your argument for whatever motion that you wish to make, counsel.

MR. HILL: Well, first of all, Judge, I have not seen [984] the Court's latest charge to know whether or not the proprietorship issue that was decided in Urantia Foundation's favor on summary judgment is in play or is not in play, but we would certainly take the position citing the Nimmer treatise, Burton and Maaherra, that the mere possession of the manuscripts in an unpublished form combined with the later registration of statutory copyright and no evidence whatsoever that the subject ever protested is prima facie evidence, and in this case, because of a lack of any evidence on the intent of the subject, is dispositive evidence of the proprietorship issue, and would move for judgment as a matter of law on that issue for starters.

Secondly, we would move for directed verdict or judgment as a matter of law with respect to the composite work issue pointing again to the very same evidence that I pointed out in refuting their motion.

And we would move for judgment as a matter of law on the commissioned work theory and we would cite – we would cite – initially we would cite the Town of Clarkstown v. Reeder case.

Just to go into a little bit more detail than what I went into in refuting their motion, the court in that case addressed a situation where there were ongoing discussions between the town and Reeder about the drafting of a youth court manual. The manual was compiled by Mr.

Reeder from ideas and suggestions of others in the town government. There was [985] monitoring of some of Reeder's expression of his own thoughts, and there was also monitoring by the town of expression of the thoughts and ideas of others separate and apart from that process.

There was no evidence, according to the court in Reeder, that there were actual orders made by the town government regarding what Reeder needed to include in the content or format of the book. And it was undenied in that case that Mr. Reeder was working as a volunteer throughout the process. Under those circumstances, the court found that the work was a work for hire/commissioned work and entered judgment on behalf of the town accordingly.

And we would submit that our facts fit closest to Reeder among all of the cases that I'm aware of in the commissioned works and works-for-hire arena, and we'd move for judgment as a matter of law on that basis.

Thank you, Judge.

THE COURT: I think I'll save a response and deny the motion for judgment as a matter of law. My rule on the proprietorship issue, I treated that motion as a motion to reconsider, and that likewise has been denied, and my order is available for distribution, I think on that limited issue.

So, you gentlemen work with my lawyer on instructions. Get all of the conflicts resolved, if you can. If you can't, why, we'll resolve them in the morning.

Federal Rules of Civil Procedure

Rule 50

(a) Judgment as a Matter of Law.

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment – and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

(C) direct entry of judgment as a matter of law; or

(2) if no verdict was returned:

(A) order a new trial, or

(B) direct entry of judgment as a matter of law.

(c) Granting Renewed Motion for Judgment as a Matter of Law; Conditional Rulings; New Trial Motion.

(1) If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered shall be filed no later than 10 days after entry of the judgment.

(d) Same: Denial of Motion for Judgment as a Matter of Law. If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial

court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

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17 U.S.C. § 302

(a) In general. Copyright in a work created on or after January 1, 1978, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and 70 years after the author's death.

(b) Joint works. In the case of a joint work prepared by two or more authors who did not work for hire, the copyright endures for a term consisting of the life of the last surviving author and 70 years after such last surviving author's death.

(c) Anonymous works, pseudonymous works, and works made for hire. In the case of an anonymous work, a pseudonymous work, or a work made for hire, the copyright endures for a term of 95 years from the year of its first publication, or a term of 120 years from the year of its creation, whichever expires first. If, before the end of such term, the identity of one or more of the authors of an anonymous or pseudonymous work is revealed in the records of a registration made for that work under subsections (a) or (d) of section 408, or in the records provided by this subsection, the copyright in the work endures for the term specified by subsection (a) or (b), based on the life of the author or authors whose identity has been revealed. Any person having an interest in the copyright in an

anonymous or pseudonymous work may at any time record, in records to be maintained by the Copyright Office for that purpose, a statement identifying one or more authors of the work; the statement shall also identify the person filing it, the nature of that person's interest, the source of the information recorded, and the particular work affected, and shall comply in form and content with requirements that the Register of Copyrights shall prescribe by regulation.

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17 U.S.C. § 410(c)

In any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate.